

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE PRESIDING

- - -

USA,)	
)	
PLAINTIFF,)	
)	
VS.)	CR18-00050-JAK
)	
SHIH, ET AL.,)	
DEFENDANTS.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
THURSDAY, OCTOBER 4, 2018; 8:30 AM

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FOR DEFENDANT MAI:
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1 LOS ANGELES, CALIFORNIA; THURSDAY, OCTOBER 4, 2018

2 8:30 AM

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5
6 THE COURT: ITEM NO. 5, CR18-00050, USA V.
7 YI-CHI SHIH, ET AL.

8 WOULD YOU STATE YOUR APPEARANCES, PLEASE.

9 MR. SHOBAKI: GOOD MORNING, YOUR HONOR. KHAL
10 SHOBAKI AND JUDITH HEINZ ON BEHALF OF THE
11 UNITED STATES.

12 THE COURT: GOOD MORNING.

13 MR. HANUSZ: GOOD MORNING, YOUR HONOR. JOHN
14 HANUSZ FOR YI-CHI SHIH. HIS WAIVER IS ON FILE.

15 MR. LITTRELL: GOOD MORNING, YOUR HONOR. JOHN
16 LITTRELL HERE WITH TONY BISCONTI ON BEHALF OF KIET MAI.
17 HE IS PRESENT. THERE'S A WAIVER ON FILE, BUT I HAVE
18 INSTRUCTED HIM TO APPEAR OUT OF AN ABUNDANCE OF
19 CAUTION, AS THEY SAY, SO THAT THE COURT CAN TAKE A
20 COLLOQUY AS THE GOVERNMENT -- WITHOUT BELABORING IT,
21 THE COURT -- I UNDERSTAND THE GOVERNMENT OBJECTS TO THE
22 WAIVER OF PRESENCE, AND THEY WANT A COLLOQUY TO BE
23 DONE. SO I ASK THE COURT TO DO THAT TODAY SO, IN THE
24 FUTURE, MR. MAI WILL NOT HAVE TO APPEAR, IF THE COURT
25 DETERMINES THAT'S REQUIRED.

1 THE COURT: OKAY. THANK YOU.

2 PLEASE BE SEATED.

3 LET'S START WITH THAT. THE GOVERNMENT --
4 WELL, THE GOVERNMENT -- DOES THE GOVERNMENT CONTINUE TO
5 OBJECT TO THE WAIVER -- THE WRITTEN WAIVER OF
6 APPEARANCE THAT WAS MADE -- WELL, ACTUALLY, EACH
7 DEFENDANT MADE IT, AND ONE IS HERE.

8 MR. SHOBAKI: YES, YOUR HONOR. FOR THE
9 REASONS SET FORTH IN THE OBJECTION FILED BY THE
10 UNITED STATES.

11 THE POSITION OF THE UNITED STATES IS THAT
12 THE WAIVER, AS CONTAINED IN THAT DOCUMENT, IS NOT
13 SUFFICIENT. AND, ALBEIT, UNDERSTANDING THAT IT'S A
14 COURT FORM, THE UNITED STATES' POSITION IS THAT IT'S
15 NOT SUFFICIENT. CITED SOME CASE LAW DEALING WITH THAT
16 ISSUE.

17 YOU KNOW, LIKE ANY OTHER WAIVER OF
18 CONSTITUTIONAL RIGHTS, IT NEEDS TO BE KNOWING AND
19 VOLUNTARY. THERE'S NO INDICATION ON THAT FORM THAT
20 IT'S KNOWING AND VOLUNTARY.

21 COURTS HAVE DONE A VARIETY OF THINGS TO
22 SATISFY THAT. THE MOST COMMON IS THE SAME THING THAT
23 THIS COURT DOES DURING EVERY PLEA HEARING, IS SPEAKING
24 WITH THE DEFENDANT AND THEIR ATTORNEY, MAKING SURE THEY
25 WERE ADVISED, AND THEN DEEMING THE WAIVER KNOWING AND

1 VOLUNTARY.

2 WITH RESPECT TO TODAY'S PROCEEDING, THE
3 UNITED STATES' POSITION IS THAT, IF NO WAIVER IS -- NO
4 KNOWING AND VOLUNTARY WAIVER IS TAKEN BEFORE THE COURT
5 AND THE COURT PROCEEDS, THE UNITED STATES WOULD ASK,
6 WITH RESPECT TO MR. SHIH, THAT, AT THE NEXT HEARING IN
7 THIS MATTER, THAT THE COURT TAKE THAT WAIVER AND -- AT
8 THE VERY LEAST.

9 THERE'S AN ARGUMENT THAT, UNDER RULE 43,
10 THE ISSUES PRESENTED HERE ARE ISSUES OF LAW. THERE'S
11 AN ARGUMENT THAT POSSIBLY NO PRESENCE IS REQUIRED FOR
12 THE HEARING ON THAT BASIS.

13 HOWEVER, BECAUSE THE UNITED STATES,
14 ULTIMATELY, IN ANY APPELLATE PROCEEDING, WOULD HAVE TO
15 SHOW THAT A WAIVER WAS KNOWING AND VOLUNTARY, TO
16 PROTECT THE RECORD, WE'RE ASKING THAT THE COURT TAKE
17 THOSE WAIVERS.

18 THE COURT: WHAT IS YOUR POSITION WITH RESPECT
19 TO A WAIVER MADE TODAY ON THE RECORD WITH MR. MAI AND
20 ITS APPLICATION TO FUTURE PROCEEDINGS, IF HE SIGNS A
21 WRITTEN WAIVER EACH TIME?

22 MR. SHOBAKI: YOUR HONOR, THE GOVERNMENT'S
23 POSITION IS THAT A WAIVER TAKEN UNDER ADVICE BY THE
24 COURT TODAY BY MR. MAI WOULD BE SUFFICIENT, OTHER THAN
25 FOR CRITICAL ASPECTS OF THE CASE, SUCH AS TRIAL,

1 SENTENCING. BUT FOR OTHER PROCEEDINGS, I THINK THAT
2 WAIVER WOULD BE SUFFICIENT.

3 THE COURT: AND DO YOU AGREE WITH THAT?

4 MR. LITTRELL: YES, I DO.

5 THE COURT: OKAY. THANK YOU.

6 MR. HANUSZ, WHAT'S YOUR VIEW WITH RESPECT
7 TO MR. SHIH?

8 MR. HANUSZ: I'M GOING TO TAKE THE LECTERN, IF
9 I CAN, YOUR HONOR?

10 THE COURT: THAT'S FINE.

11 MR. HANUSZ: IT'S EASIER THAN BENDING OVER.

12 SO A COUPLE THINGS, YOUR HONOR. AS THE
13 GOVERNMENT NOTES, WE FILED THE COURT'S FORM MOTION.
14 THERE'S NO -- THERE IS NO SLOT ON THAT PIECE OF PAPER
15 FOR THE COURT TO SIGN.

16 THE GOVERNMENT HAS CITED NO CONTROLLING
17 CASE LAW.

18 THE SECOND CIRCUIT CASE WHICH THE
19 GOVERNMENT CITES INDICATES IT'S NOT A CONSTITUTIONAL
20 ISSUE. AND IT ALSO INDICATES THAT, SHOULD THE COURT
21 WANT TO TAKE A COLLOQUY WITH THE ATTORNEY, THE COURT
22 MAY DO THAT. THE CIRCUMSTANCES IN THAT CASE DEALT WITH
23 A RESENTENCING. WE'RE DEALING WITH A MOTION'S HEARING.
24 AND IT WAS ALSO A LETTER SIGNED -- WHAT WAS SUBMITTED
25 TO THE COURT WAS A LETTER SIGNED BY THE ATTORNEY, WHICH

1 IS VERY DIFFERENT FROM WHAT WE HAVE HERE. AND,
2 CERTAINLY, DR. SHIH HAS SIGNED PLENTY OF BOND
3 DOCUMENTS. THE COURT IS ABLE TO COMPARE THOSE
4 SIGNATURES AND MAKE A JUDGMENT AS TO WHETHER THOSE
5 SIGNATURES ARE ACCURATE.

6 DR. SHIH IS NOT HERE TODAY BECAUSE HIS
7 BROTHER DIED. AND HE IS IN ATLANTA WITH PRETRIAL
8 SERVICES' PERMISSION TO BE AT A FUNERAL. HE WOULD
9 OTHERWISE BE HERE. THIS IS SOMETHING THAT CAME UP IN
10 THE LAST COUPLE OF DAYS.

11 BUT THERE'S NO COLLOQUY NEEDED. AND OUR
12 POSITION IS KIND OF MUCH ADO ABOUT NOTHING. WE HAVE
13 FILED THE FORM. I'M HAPPY TO STATE TO THE COURT THAT I
14 HAVE ADVISED DR. SHIH ABOUT HIS RIGHTS.

15 THE COURT: YOU'VE HAD A -- DID YOU CONFER
16 WITH DR. SHIH AFTER THE GOVERNMENT OBJECTED?

17 MR. HANUSZ: NO. I CONFERRED BEFORE THE
18 WAIVER WAS SIGNED.

19 THE COURT: SO YOU HAVEN'T CONFERRED WITH HIM
20 SINCE THE WAIVER WAS SIGNED?

21 MR. HANUSZ: YOUR HONOR, THE OBJECTION -- OR
22 THE --

23 THE COURT: YOU'VE ANSWERED MY QUESTION.

24 PRIOR TO THE SIGNING OF THE WAIVER, I
25 DON'T WANT TO INTRUDE INTO THE ATTORNEY/CLIENT

1 PRIVILEGE BEYOND A VERY -- AT ALL, FRANKLY. SO I'M NOT
2 ASKING YOU FOR ADVICE, ANY COMMUNICATION ABOUT LEGAL
3 ADVICE NECESSARILY GIVEN.

4 BUT IS THERE ANY QUESTION IN YOUR MIND
5 THAT DR. SHIH UNDERSTOOD THAT HE HAD THE RIGHT TO BE
6 PRESENT?

7 MR. HANUSZ: THERE'S NO QUESTION IN MY MIND,
8 YOUR HONOR.

9 THE COURT: AND IS THERE ANY QUESTION IN YOUR
10 MIND THAT IN LIGHT OF THE -- I'M SORRY TO HEAR ABOUT
11 HIS LOSS. THAT IN LIGHT OF THE FAMILY LOSS, THAT HAD
12 HE WISHED TO DO BOTH - THAT IS TO SAY, TRAVEL TO
13 ATLANTA TO BE AT THE MEMORIAL SERVICE AND ATTEND A
14 HEARING ON THE ISSUES THAT ARE SCHEDULED FOR TODAY -
15 ONE OPTION COULD HAVE BEEN TO REQUEST THAT THE HEARING
16 BE RESCHEDULED SO THAT HE CAN DO BOTH?

17 MR. HANUSZ: SO THE QUESTION IS, IS THERE ANY
18 DOUBT IN MY -- I GUESS I'M NOT SURE OF THE COURT'S
19 QUESTION.

20 THE COURT: MY QUESTION IS, DO YOU FEEL -- DO
21 YOU KNOW WHETHER HE FELT HE HAD TO MAKE A CHOICE,
22 ATTEND A HEARING OR ATTEND A FUNERAL?

23 MR. HANUSZ: NO, I DON'T BELIEVE HE THOUGHT HE
24 HAD TO MAKE A CHOICE.

25 THE COURT: SO IT IS YOUR VIEW THAT THE -- BY

1 SIGNING THE WAIVER, HE KNOWINGLY, VOLUNTARILY AND
2 INTELLIGENTLY GAVE UP HIS RIGHT TO BE HERE TODAY WITH
3 RESPECT TO TODAY'S PROCEEDINGS; IS THAT RIGHT?

4 MR. HANUSZ: IT'S CERTAINLY WITH RESPECT TO
5 TODAY'S PROCEEDINGS, BUT I THINK -- YES, YOUR HONOR.
6 WITH RESPECT TO TODAY'S PROCEEDINGS.

7 I THINK THE WAIVER IS A LITTLE BROADER
8 THAN THAT. BUT, YES, WITH RESPECT TO TODAY'S
9 PROCEEDINGS, THAT'S CORRECT.

10 THE COURT: YOU SAID THIS EARLIER, BUT I WANT
11 TO CONFIRM IT. I TAKE IT THAT -- IS IT YOUR VIEW HE
12 WILL BE HERE IN THE FUTURE ABSENT SOME UNUSUAL
13 CIRCUMSTANCES LIKE THE ONES PRESENTED FOR TODAY?

14 MR. HANUSZ: I DO, YOUR HONOR. JUST AS HE'S
15 BEEN HERE FOR EVERY HEARING.

16 THE COURT: THAT'S FINE.

17 THANK YOU.

18 MR. HANUSZ: THANK YOU, YOUR HONOR.

19 THE COURT: MR. MAI?

20 DEFENDANT MAI: YES.

21 THE COURT: HAVE YOU BEEN FOLLOWING ALONG WITH
22 THE DISCUSSIONS THAT I'VE HAD?

23 DEFENDANT MAI: YES.

24 THE COURT: YOU UNDERSTAND YOU HAVE A RIGHT TO
25 BE PRESENT AT EVERY PROCEEDING?

1 DEFENDANT MAI: YES, YOUR HONOR.

2 THE COURT: AND THE REASON FOR THAT IS, SO
3 THAT IF THERE'S -- AMONG OTHER THINGS, IS THAT YOU
4 FULLY UNDERSTAND WHAT'S HAPPENED.

5 AND ANOTHER REASON FOR THAT IS, SO THAT
6 IF, DURING THE COURSE OF ANY PROCEEDING, THERE'S
7 INFORMATION THAT YOU HAVE AND YOU WISH TO SHARE IT WITH
8 COUNSEL OR WISH TO HAVE COUNSEL COMMUNICATE TO YOU SO
9 YOU CAN, IN TURN, PROVIDE INFORMATION TO COUNSEL, THAT,
10 IF YOU'RE NOT HERE, YOU CAN'T DO THAT.

11 DO YOU UNDERSTAND THAT?

12 DEFENDANT MAI: YES, I DO, YOUR HONOR.

13 THE COURT: OKAY. BUT WITH RESPECT -- YOU
14 SIGNED A FORM PRIOR TO TODAY; IS THAT RIGHT?

15 DEFENDANT MAI: YES, I DID.

16 THE COURT: AND BY SIGNING THAT FORM, YOU --
17 DID YOU UNDERSTAND THAT YOU WERE GIVING UP YOUR RIGHT
18 TO BE HERE TODAY?

19 DEFENDANT MAI: YES, YOUR HONOR.

20 THE COURT: BUT YOU'RE HERE NONETHELESS;
21 CORRECT?

22 DEFENDANT MAI: YES, YOUR HONOR.

23 MR. LITTRELL: TO CLARIFY, HE WAS NOT GIVING
24 UP HIS RIGHT TO BE HERE.

25 THE COURT: WELL --

1 MR. LITTRELL: I DON'T MEAN TO MUDDY UP THE
2 RECORD, BUT HE WAS GIVING HIMSELF THE OPTION NOT TO BE
3 HERE.

4 THE COURT: I THINK HE HAD THE RIGHT TO BE
5 HERE. AND IF HE CHOSE NOT TO BE HERE, I THINK HE WAS
6 GIVING UP THE RIGHT TO BE HERE.

7 MR. LITTRELL: I AGREE WITH THAT, YOUR HONOR.

8 DEFENDANT MAI: I UNDERSTOOD YOU ON THAT
9 POINT.

10 THE COURT: AND, MR. MAI, DO YOU ALSO
11 UNDERSTAND THAT, IF THERE WERE A HEARING IN THE FUTURE,
12 AND AFTER CONFERRING WITH MR. LITTRELL AND/OR
13 MR. BISCONTI, YOU DETERMINED THAT YOU -- YOU WERE NOT
14 GOING TO BE AT THE HEARING, THAT YOU DID NOT NEED TO BE
15 AT THE HEARING, EVEN THOUGH YOU HAD THE RIGHT TO BE
16 HERE, DO YOU UNDERSTAND THAT YOU COULD SIGN ANOTHER
17 FORM WITH RESPECT TO THAT HEARING?

18 DEFENDANT MAI: ABSOLUTELY, YOUR HONOR.

19 THE COURT: IS THAT YOUR PLAN?

20 MR. LITTRELL: NO, YOUR HONOR.

21 WE INTEND THIS FORM TO WAIVE HIS RIGHT TO
22 BE PRESENT AT ANY HEARING, OTHER THAN, YOU KNOW, AS SET
23 FORTH IN THE TERMS OF THE ORDER. WE DID NOT INTEND TO
24 DO THIS PIECEMEAL. I DON'T THINK THE GOVERNMENT
25 OBJECTS TO THAT.

1 HE'S WAIVING HIS RIGHT TO BE PRESENT AS
2 SET FORTH IN THAT ORDER.

3 THE COURT: DO YOU AGREE WITH THAT?

4 MR. SHOBAKI: YES, YOUR HONOR.

5 THE COURT: ALL RIGHT. I'LL ACCEPT THE
6 WAIVER, PROVIDED, HOWEVER, THAT IF THERE IS -- IF
7 EITHER OR BOTH DEFENDANTS DO NOT OR DOES NOT APPEAR AT
8 A HEARING, AND IN MY DETERMINATION THE MATTERS ARE
9 SUFFICIENTLY WEIGHTY THAT I'M CONCERNED ABOUT THEIR NOT
10 BEING PRESENT, I'LL RESERVE THE ISSUE AS TO WHETHER I
11 WILL PROCEED WITHOUT EITHER OR BOTH OF THEM AT SOME
12 SUCH HEARING IN THE FUTURE, NOTWITHSTANDING THEIR
13 AGREEMENT THAT THEY DO NOT NEED TO BE HERE.

14 NOW, THERE WAS ANOTHER ISSUE CONCERNING
15 THE TERMS OF THE BOND OF MR. SHIH; CORRECT?

16 THAT WAS WHETHER THE DAILY PHONE CONTACT
17 HAD TO BE MADE?

18 MR. HANUSZ: THAT'S THE -- TWO ISSUES THERE,
19 YOUR HONOR. THE FIRST IS THE DRUG TESTING CONDITION,
20 WHICH THE GOVERNMENT APPEARS TO NOT OBJECT TO LIFTING
21 THAT. AND THEN THE PHONE -- THE DAILY PHONE CALL TO
22 PRETRIAL SERVICES.

23 THE COURT: IN YOUR SUBMISSION WITH RESPECT TO
24 THAT, YOU STATED THAT YOUR CLIENT IS -- IS HE WEARING
25 AN ELECTRONIC MONITORING DEVICE?

1 MR. HANUSZ: HE IS, PURSUANT TO THIS COURT'S
2 ORDER.

3 THE COURT: OKAY. HE'S WEARING THAT IN
4 ATLANTA, AS FAR AS YOU KNOW?

5 MR. HANUSZ: HE IS, YOUR HONOR.

6 AND JUST -- IF I MAY, YOUR HONOR?

7 I SPOKE TO MANUEL IBANEZ FROM PRETRIAL
8 SERVICES ABOUT THIS ISSUE. I THINK IT'S CLEARLY STATED
9 IN OUR POSITION, BUT HE IS -- SUPPORTS LIVING BOTH
10 CONDITIONS.

11 THE COURT: I UNDERSTAND.

12 MR. SHOBAKI, ARE YOU GOING TO ADDRESS
13 THIS?

14 MS. HEINZ: YOUR HONOR, I WILL ADDRESS THIS.

15 THE COURT: ALL RIGHT. MS. HEINZ?

16 MS. HEINZ: YES, YOUR HONOR.

17 THERE'S NO NEW INFORMATION HERE TO
18 SUPPORT A CHANGE IN THE BOND CONDITIONS.

19 AT THE TIME THAT YOUR HONOR ORDERED THE
20 INITIAL BOND CONDITIONS, YOUR HONOR ORDERED THAT
21 MR. SHIH BE PLACED ON ACTIVE GPS MONITORING WITH THE
22 ANKLE BRACELET, AND ALSO THAT HE CALL ONCE A DAY AT --
23 WELL, THEY SET IT UP FOR 2:00 O'CLOCK EACH DAY. THAT
24 HE CALL EACH DAY AND PERSONALLY SPEAK TO HIS PRETRIAL
25 SERVICES OFFICER AND CONFER WITH THE PRETRIAL OFFICER

1 AND TELL HIM WHERE HE WAS. AND I ASSUME ANY OTHER
2 INFORMATION THAT THE PRETRIAL SERVICES OFFICER WISH TO
3 KNOW AT THAT TIME.

4 SO THOSE TWO CONDITIONS WERE SET UP. AND
5 YOUR HONOR SET THOSE UP ACCORDING TO THE DETENTION --
6 PRETRIAL SERVICES BOND CONDITIONS ORDER THAT YOUR
7 HONOR -- THAT YOUR ORDER -- I'M SORRY, THAT YOUR HONOR
8 ISSUED, SET THOSE UP BECAUSE OF THE EXTREME FLIGHT RISK
9 THAT DEFENDANT SHIH POSES.

10 THOSE FLIGHT RISKS FACTORS HAVE NOT
11 CHANGED HERE. THERE IS NOTHING DIFFERENT HERE.

12 TO THE EXTENT THAT DEFENDANT SHIH AND/OR
13 THE PRETRIAL SERVICES OFFICER HAS ARGUED THAT THAT
14 PHONE CALL IS REDUNDANT BECAUSE PRETRIAL SERVICES
15 KNOWS, ACCORDING TO THE ACTIVE MONITORING, WHERE
16 DEFENDANT SHIH IS, THAT DOESN'T CHANGE THE FACT THAT
17 THAT WAS THE ORDER FROM THE VERY BEGINNING. AND SO
18 THAT REDUNDANCY WAS BUILT INTO THE SYSTEM. IT WAS AN
19 EXTRA MEASURE, WHICH THIS COURT IMPOSED, DUE TO THE
20 EXTREME FLIGHT RISK THAT DEFENDANT SHIH POSES. SO THE
21 GOVERNMENT BELIEVES THERE IS NOTHING THAT SHOULD BE
22 CHANGED HERE.

23 THE GOVERNMENT DOES NOTE THAT DR. SHIH
24 HAS UNDERGONE MANY DRUG TESTS AND HAS NEVER TESTED
25 POSITIVE FOR DRUGS. SO IT DOES THINK THAT THAT'S A

1 CHANGED CONDITION. AND SO IT DOES NOT OPPOSE
2 ELIMINATING THAT CONDITION FROM THE BOND CONDITIONS.

3 THE COURT: ALL RIGHT. DO YOU CONTEND THAT
4 DR. SHIH DIDN'T MAKE ANY OF THE REQUIRED CALLS?

5 MS. HEINZ: NO. THE GOVERNMENT DOESN'T -- THE
6 GOVERNMENT'S UNDERSTANDING IS, THAT HE DOES MAKE THAT
7 PHONE CALL EVERYDAY.

8 THE COURT: AND, MR. HANUSZ, WHAT IS THE
9 BURDEN OF MAKING THE -- WHAT IS THE BASIS FOR THE
10 REQUEST AS TO THE PHONE -- DAILY PHONE CALL?

11 MR. HANUSZ: SO, YOUR HONOR, THE BASIS OF THE
12 REQUEST -- AND I WOULD DISAGREE WITH THE GOVERNMENT'S
13 POSITION. THERE ARE CHANGED CIRCUMSTANCES --

14 THE COURT: NO.

15 WHAT I WANT TO KNOW IS, WHY IS IT
16 BURDENSOME TO MAKE A PHONE CALL EVERYDAY?

17 MR. HANUSZ: I DON'T THINK THE QUESTION IS
18 "WHY IS IT." I WOULD REFRAME THE QUESTION AS --

19 THE COURT: WELL, HOW ABOUT ANSWERING MY
20 QUESTION?

21 MR. HANUSZ: HOW IS IT BURDENSOME? IT'S ONE
22 MORE OBLIGATION. IT'S ONE MORE REQUIREMENT THAT HE HAS
23 TO FULFILL AS PART OF HIS BOND.

24 YOUR HONOR, IF I MAY?

25 THE COURT: BRIEFLY. GO AHEAD.

1 MR. HANUSZ: MY UNDERSTANDING IS THAT THE VAST
2 MAJORITY OF DAYS, HE JUST LEAVES A MESSAGE. HE CALLS
3 MR. IBANEZ'S CELL PHONE AND LEAVES A MESSAGE.

4 WITH HIS GPS, THEY KNOW WHERE HE IS ALL
5 THE TIME.

6 THE COURT: IS THERE ANYTHING YOU WANTED TO
7 ADD?

8 MS. HEINZ: YOUR HONOR, EVEN IF HE'S JUST
9 LEAVING A MESSAGE, THEN HIS PRETRIAL SERVICES OFFICER
10 RECEIVES THAT MESSAGE, KNOWS THAT HE HAS COMPLIED WITH
11 IT. AND IT DOES NOT APPEAR, AT LEAST TO THE
12 GOVERNMENT, THAT THIS IS PARTICULARLY BURDENSOME AT
13 ALL.

14 THE COURT: THANK YOU.

15 MY VIEW ON THIS IS THE FOLLOWING: I
16 THINK IT'S WITHIN THE DISCRETION OF A COURT TO CONSIDER
17 A REQUEST TO MODIFY CERTAIN CONDITIONS, AND CAN
18 EVALUATE THAT REQUEST IN THE CONTEXT OF WHAT THE
19 POSITION OF THE OFFICER WHO IS OVERSEEING THE DEFENDANT
20 STATES AS TO THAT PERSON'S VIEW, BECAUSE THAT IS THE
21 PERSON THAT IS CARRYING OUT THE OVERSIGHT.

22 I AGREE THAT -- AND THERE'S NO DISPUTE
23 BETWEEN THE PARTIES WITH RESPECT TO WHETHER THE DRUG
24 TESTING CONDITION SHOULD BE MODIFIED BY BEING
25 TERMINATED. AND I AGREE THAT THE DRUG TESTING

1 CONDITION WILL BE REMOVED, PROVIDED, HOWEVER, THIS
2 WOULD BE WITHOUT PREJUDICE TO A LATER REQUEST BY THE
3 PRETRIAL SERVICES OFFICER TO REINSTATE THAT CONDITION,
4 IF THERE'S A FACTUAL BASIS UPON WHICH SUCH A REQUEST IS
5 MADE.

6 WITH RESPECT TO THE REQUIRED PHONE
7 CONTACT, MY VIEW IS THAT, I DON'T HAVE EVIDENCE. I
8 HAVE STATEMENTS CONCERNING WHETHER THE DEFENDANT AND
9 THE PRETRIAL SERVICES OFFICER ACTUALLY SPOKE EACH TIME
10 THE CALL -- EACH TIME DR. SHIH CALLED. I DON'T KNOW.

11 BUT MY VIEW IS THAT -- AND I ALSO AM OF
12 THE VIEW THAT MAKING A DAILY CALL, PARTICULARLY IF
13 IT'S -- IF THE REPRESENTATION THAT'S MADE IS THAT IT'S
14 LEAVING A VOICE MAIL, THAT LEAVING A VOICE MAIL ONCE A
15 DAY AT A CERTAIN HOUR IS NOT PARTICULARLY BURDENSOME.

16 AT THE SAME TIME, I'M MINDFUL THAT THE
17 PRETRIAL SERVICES OFFICER DOESN'T BELIEVE THAT THIS
18 CONDITION REMAINS ONE THAT IS NECESSARY TO ENSURE
19 COMPLIANCE.

20 AND IN LIGHT OF THE ELECTRONIC
21 MONITORING, I'M GOING TO MODIFY THE CALL REQUIREMENT
22 AND REQUIRE THAT IT BE A WEEKLY CALL TO BE PLACED
23 MONDAY OF EACH WEEK AT THE SAME HOUR THAT WAS
24 PREVIOUSLY SET BY THE PRETRIAL SERVICES OFFICER AND
25 DEFENDANT DR. SHIH.

1 PROVIDED, HOWEVER, AGAIN, THAT TO THE
2 EXTENT -- THAT IS WITHOUT PREJUDICE TO A DETERMINATION
3 WITHIN THE DISCRETION OF THE PRETRIAL SERVICES OFFICER
4 TO REQUIRE MORE FREQUENT CALLS, IF THERE'S A BASIS UPON
5 WHICH THE PRETRIAL OFFICER BELIEVES, IN HIS DISCRETION,
6 THAT MORE CALLS ARE APPROPRIATE.

7 MS. HEINZ: YOUR HONOR, MAY I BE HEARD FOR ONE
8 MINUTE?

9 THE COURT: YES.

10 MS. HEINZ: WOULD YOU CONSIDER ALLOWING THE
11 PRETRIAL SERVICES OFFICER MAKE THE DAY OF THE WEEK?
12 MONDAYS CAN SOMETIMES BE BUSY FOR PRETRIAL.

13 THE COURT: ANY OBJECTION TO THAT?

14 MR. HANUSZ: NO, YOUR HONOR. JUST SO IT'S
15 CLEAR TO EVERYONE INVOLVED. THAT'S FINE.

16 THE COURT: I'M GOING TO SET IT -- I'M GOING
17 TO SET IT FOR MONDAY AT THE 2:00 P.M. HOUR THE PARTIES
18 PREVIOUSLY HAD BEEN USING. HOWEVER, IN THE DISCRETION
19 OF THE PRETRIAL SERVICES OFFICER, A DIFFERENT TIME CAN
20 BE ADOPTED AND A DIFFERENT DAY OF THE WEEK CAN BE
21 ADOPTED.

22 MR. HANUSZ: THANK YOU, YOUR HONOR.

23 THE COURT: THANK YOU.

24 MS. HEINZ: THANK YOU, YOUR HONOR.

25 THE COURT: THE ANKLE -- ALL OTHER TERMS AND

1 CONDITIONS OF THE BOND REMAIN IN PLACE, INCLUDING THE
2 ELECTRONIC MONITORING.

3 THE NEXT ISSUE CONCERNS THE -- THERE ARE
4 TWO MOTIONS. ONE IS A MOTION TO DISMISS. AND THE
5 OTHER, A MOTION -- OR A REQUEST FOR A BILL OF
6 PARTICULARS.

7 JUST A MOMENT.

8 I'M GOING TO PROVIDE YOU WITH -- EACH
9 SIDE WITH A COPY OF A TENTATIVE RULING WITH RESPECT TO
10 THE MOTION TO DISMISS COUNT 9.

11 AS IT STATES AT THE TOP, THIS IS ONLY A
12 TENTATIVE. IT'S NOT TO BE COPIED IN ANY FASHION,
13 WHETHER BY CAMERA, TELEPHONE, IN HAND OR ANY OTHER
14 MEANS. AND AT THE END OF TODAY'S HEARING, IT'S TO BE
15 RETURNED TO THE CLERK.

16 AND, AGAIN, THIS ADDRESSES ONLY THE
17 MOTION TO DISMISS. IT DOESN'T ADDRESS THE BILL OF
18 PARTICULARS.

19 **(PAUSE IN THE PROCEEDINGS)**

20 THE COURT: MR. LITTRELL, HAVE YOU HAD A
21 CHANCE TO REVIEW THAT?

22 MR. LITTRELL: I DID, YOUR HONOR.

23 THE COURT: AND, MR. HANUSZ?

24 MR. HANUSZ: YES, YOUR HONOR.

25 THE COURT: OKAY. MS. HEINZ?

1 MS. HEINZ: YES, YOUR HONOR.

2 THE COURT: MR. SHOBAKI?

3 MR. SHOBAKI: YES, THE GOVERNMENT HAS REVIEWED
4 IT. THANK YOU.

5 THE COURT: WHO WILL ADDRESS THIS FOR THE
6 MOVING PARTIES?

7 MR. LITRELL: YOUR HONOR, I APPRECIATE THE
8 THOUGHT THAT THE COURT PUT INTO THE TENTATIVE RULING.
9 OBVIOUSLY, WE DISAGREE. AND I THINK THAT THIS IS A
10 DIFFICULT ISSUE, AND I WANT TO LET THE COURT KNOW WHY I
11 THINK THE COURT GETS IT WRONG HERE.

12 THE COURT: IT DOES HAPPEN TO ME FROM TIME TO
13 TIME, PEOPLE DISAGREE WITH WHAT I THINK.

14 BUT TO BE CLEAR, I DON'T TYPICALLY GIVE
15 OUT WRITTEN TENTATIVE VIEWS. BUT I RECOGNIZE, HERE,
16 THE ISSUES ARE SOMEWHAT COMPLEX. SO I WANTED YOUR
17 VIEWS AFTER YOU'VE READ THIS, SO I CAN LEARN FROM WHAT
18 YOU HAVE TO SAY.

19 GO AHEAD, PLEASE.

20 MR. LITRELL: I THINK, AS A STARTING POINT, I
21 THINK IT'S ALL -- ALL THESE CASES HAVE TO BE READ WITH
22 THE UNDERSTANDING THAT, WHEN CONGRESS PASSED THIS
23 STATUTE, THEY WANTED TO PENALIZE HACKING. THEY WANTED
24 TO PUNISH UNAUTHORIZED ACCESS TO A COMPUTER. THEY
25 DIDN'T WANT TO PUNISH THE UNAUTHORIZED USE OF

1 INFORMATION THAT WAS OBTAINED FROM THE COMPUTER,
2 REGARDLESS OF HOW IT WAS OBTAINED.

3 AND THE REASONING THERE WAS, IF THE
4 STATUTE WERE INTERPRETED BROADLY ENOUGH TO MAKE -- TO
5 CRIMINALIZE WITH A FELONY, SOMEBODY WHO HAD JUST
6 MISUSED INFORMATION THAT HAD BEEN UNLAWFULLY ACCESSED,
7 IT WOULD REACH A BROAD SWATH OF CONDUCT. AND THAT'S
8 NOT WHAT CONGRESS INTENDED.

9 AND SO THE FIRST THREE CASES THAT THE
10 COURTS DECIDED RECOGNIZE THAT DISTINCTION.

11 AND OUR ARGUMENT, ESSENTIALLY, JUST TO
12 BOIL IT DOWN, IS THAT THIS CASE REALLY IS
13 INDISTINGUISHABLE FROM NOSAL I, WHICH IS THE 2012
14 DECISION IN THE NINTH CIRCUIT.

15 THE CASES LIE ON A SPECTRUM, THE WAY I
16 SEE IT, WITH BREKKA ON ONE END OF THE SPECTRUM AND
17 NOSAL II ON THE OTHER END OF THE SPECTRUM.

18 BUT A COUPLE -- AND I CAN TELL THE
19 COURT'S READ THE CASES AND UNDERSTANDS WHAT THEY SAY.
20 AND IT SOUNDS LIKE, ULTIMATELY, THE COURT'S CONCLUSION
21 IS THE SAME AS THE GOVERNMENT'S, WHICH IS THAT THIS IS
22 LIKE NOSAL II AND NOT LIKE NOSAL I.

23 I WOULD MAINTAIN THAT THIS CASE IS JUST
24 LIKE NOSAL I. AND IT REALLY TURNS ON TWO THINGS. ONE
25 IS, WHY IS THE USE UNAUTHORIZED OR WHY IS THE ACCESS

1 UNAUTHORIZED?

2 AND, TWO, NOTICE.

3 IN TERMS OF UNAUTHORIZED ACCESS, ONE OF
4 THE THINGS THAT'S VERY CLEAR FROM THESE STATUTES IS
5 THAT, SIMPLY OBTAINING -- SIMPLY, BASICALLY, IF A -- IF
6 A COMPUTER OR A WEBSITE OR A COMPANY HAS A POLICY THAT
7 FORBIDS THE USE OF INFORMATION IN A CERTAIN WAY, THAT
8 DOES NOT -- AND SOMEBODY BLATANTLY VIOLATES THAT
9 POLICY, THAT IS NOT AN UNAUTHORIZED ACCESS TO
10 INFORMATION. THAT'S AN UNAUTHORIZED USE.

11 SO IN NOSAL I, THERE WERE EMPLOYEES THAT
12 WERE E-MAILING FORMER EMPLOYEES OF THE COMPANY
13 CONFIDENTIAL INFORMATION FROM THE COMPANY'S SERVER.
14 THAT WAS IN DIRECT VIOLATION OF THAT COMPANY'S POLICY.
15 AND IT CREATED REAL HARM TO THAT COMPANY.

16 NONETHELESS, THE NINTH CIRCUIT HELD,
17 BECAUSE THE ORIGINAL ACCESSORS OF THAT INFORMATION WERE
18 AUTHORIZED TO ACCESS IT, WHAT HAPPENED TO IT AFTERWARD
19 DIDN'T MATTER. IT DIDN'T MATTER HOW IT WAS USED OR WHO
20 USED IT WITHOUT AUTHORIZATION BECAUSE THERE WAS AT
21 LEAST ONE ORIGINAL AUTHORIZED ACCESS.

22 WHAT DIFFERENTIATES NOSAL I FROM NOSAL II
23 IS THAT, IN NOSAL II, THERE WAS NO ORIGINAL AUTHORIZED
24 ACCESS TO THE COMPUTER. AND THE REASON FOR THAT WAS
25 THAT AUTHORIZATION HAD BEEN EXPLICITLY CUTOFF.

1 SO IN NOSAL II, AUTHORIZATION TO ACCESS
2 THE DATA HAD BEEN RESCINDED.

3 AND SO HERE'S THE CRITICAL DIFFERENCE:
4 IT'S ONE THING TO VIOLATE A COMPANY POLICY. IT'S
5 ANOTHER TO ACCESS DATA AFTER YOUR ACCESS HAS BEEN
6 EXPLICITLY RESCINDED.

7 AND THAT'S THE DISTINCTION THAT THEY MADE
8 IN THE FACEBOOK CASE AS WELL. THAT WAS ALSO A CASE
9 WHERE THE DEFENDANTS WERE ACCUSED OF, SORT OF, MISUSING
10 LOG-IN CREDENTIALS. THAT THERE'S NO DOUBT THAT THEY
11 HAD AUTHORIZATION TO LOG INTO FACEBOOK. THEY CERTAINLY
12 HAD A RIGHT EVEN TO -- FACEBOOK HAD A POLICY THAT
13 FORBID THEM, THE FACEBOOK USERS, FROM GIVING THEIR
14 LOG-IN CREDENTIALS TO A THIRD PARTY. THEY VIOLATED
15 THAT POLICY. AND, YET, THE COURT MADE CLEAR THAT
16 VIOLATING THAT POLICY WOULD NOT BE A VIOLATION OF THE
17 COMPUTER FRAUD AND ABUSE ACT.

18 WHAT MADE IT A CRIMINAL STATUTE IS THAT,
19 THERE WAS A CEASE AND DESIST ORDER. SO THERE WAS A
20 SPECIFIC ORDER, A DIRECTION FROM FACEBOOK CLARIFYING
21 THAT THESE PEOPLE DID NOT HAVE ACCESS TO THE
22 INFORMATION.

23 AND WHAT THE --

24 THE COURT: WHY ISN'T THERE A FACTUAL ISSUE
25 POTENTIALLY PRESENTED AS TO WHETHER DR. SHIH HAD

1 RECEIVED PERMISSION BY -- FROM CREE TO USE THE
2 COMPUTER?

3 MR. LITTRELL: THAT MAY WELL BE A FACTUAL
4 ISSUE AT TRIAL.

5 AND I AGREE WITH THE GOVERNMENT THAT THAT
6 WOULD BE A COMPLETE DEFENSE TO THIS CHARGE.

7 I ALSO AGREE WITH THE GOVERNMENT THAT
8 WE'RE STUCK WITH WHAT'S PLED IN THIS ACTUAL INDICTMENT.

9 AND THE GOVERNMENT READS IT DIFFERENTLY
10 THAN I DO. THIS INDICTMENT ALLEGES A CONSPIRACY
11 BETWEEN KIET MAI AND DR. SHIH TO PROVIDE UNAUTHORIZED
12 ACCESS TO THE COMPUTER.

13 AND SO IF YOU JUST TAKE THOSE LEGAL
14 CONCLUSIONS THAT ARE PLED IN THE INDICTMENT, AND IF
15 THAT'S SUFFICIENT TO STATE A CLAIM, THEN I THINK THE
16 GOVERNMENT WINS.

17 THE PROBLEM IS, THE GOVERNMENT STATED
18 FACTS UPON WHICH THOSE LEGAL CONCLUSIONS ARE BASED.
19 AND THE FACTS THAT ARE ACTUALLY ALLEGED IN THIS
20 INDICTMENT ARE NO DIFFERENT FROM NOSAL I.

21 THE FACTS ALLEGED IN THIS INDICTMENT THAT
22 MAKE UP THIS CONSPIRACY ARE, KIET MAI OBTAINING ACCESS
23 WITH AUTHORIZATION TO THE COMPUTER SERVERS OF CREE AND
24 THEN PASSING IT ON TO DR. SHIH. SO IT'S REALLY NO
25 DIFFERENT ON THE FACTS FROM NOSAL I.

1 I'LL NOTE THAT THIS CHRISTENSEN, WHICH IS
2 A CASE THAT FOLLOWED NOSAL I EXACTLY, ADOPTED ITS
3 RULING. IN THAT CASE, THE DEFENDANTS WERE CHARGED WITH
4 AIDING AND ABETTING THE UNAUTHORIZED ACCESS OF
5 INFORMATION BY SOMEBODY ELSE.

6 AND SO I THINK WHAT THE GOVERNMENT IS
7 ESSENTIALLY ALLEGING IS THAT, BY ALLEGING IT AS A
8 CONSPIRACY, THEN KIET MAI CAN ESSENTIALLY BE HELD
9 LIABLE, NOT FOR THE UNAUTHORIZED ACCESS TO THE
10 COMPUTER, BUT JUST FOR THE CRIMINAL AGREEMENT, THE
11 AGREEMENT WITH DR. SHIH THAT DR. SHIH WOULD ACCESS THAT
12 INFORMATION.

13 THE PROBLEM IS, THE OBJECT OF THAT
14 CONSPIRACY -- AND I KNOW THIS IS COMPLICATED. THE
15 OBJECT OF THAT CONSPIRACY ITSELF HAS TO BE LEGAL. AND
16 IF THE OBJECT OF THAT CONSPIRACY, AS THE GOVERNMENT
17 ALLEGES, IS THAT KIET MAI WOULD GAIN AUTHORIZED ACCESS
18 TO LOG-IN CREDENTIALS AND THEN GIVE THEM TO DR. SHIH,
19 AND THAT IS WHAT'S ALLEGED, THAT'S JUST, AS A MATTER OF
20 LAW, CANNOT VIOLATE THE COMPUTER FRAUD AND ABUSE ACT.

21 AND I THINK THAT THE REASON THAT THAT --
22 THIS CASE IS A VERY GOOD EXAMPLE OF WHY THAT SHOULDN'T
23 APPLY IS, THE GOVERNMENT HAS ALLEGED EIGHT COUNTS OF
24 FRAUD, I BELIEVE. AND IN OTHER COUNTS IN THE
25 INDICTMENT, THEY'RE CLAIMING THAT KIET MAI DEFRAUDED

1 CREE TO ACCESS -- AND THAT'S WHAT THIS CASE IS REALLY
2 ABOUT, FROM THE GOVERNMENT'S PERSPECTIVE.

3 AND SO TO ALLOW THE GOVERNMENT TO PROVE
4 TWO, SORT OF, OPPOSING THINGS DOESN'T MAKE MUCH SENSE.

5 AND SO I THINK THAT THE COMPUTER FRAUD
6 AND ABUSE ACT CHARGE IS A REAL STRETCH HERE. THEY'RE
7 TRYING TO BASICALLY DRESS UP SOME FACTS THAT ARE
8 INDISTINGUISHABLE FROM NOSAL I AND CHRISTENSEN AND
9 BREKKA AND CALL IT A "CONSPIRACY." AND THEN BASICALLY
10 GET AROUND THE PLAIN LANGUAGE OF THOSE DECISIONS. AND
11 I THINK THEY CAN'T -- I UNDERSTAND WHY THE COURT WOULD
12 BE INCLINED TO WANT TO SEE THIS AS A FACTUAL ISSUE.
13 BUT THE GOVERNMENT HAS TO LIVE WITH THE FACTS THAT THEY
14 HAVE PLED. AND THERE'S REALLY NO PLEADING AROUND WHAT
15 ACTUALLY HAPPENED IN THIS CASE, FROM THE GOVERNMENT'S
16 PERSPECTIVE.

17 ONE OF THE THINGS THAT THEY PLED IS THAT
18 THE INITIAL ACCESS WAS WITH AUTHORIZATION OR THAT THEY
19 AT LEAST DON'T CLAIM IT WAS WITHOUT AUTHORIZATION. AND
20 UNDER BREKKA, NOSAL AND CHRISTENSEN, THAT REALLY IS THE
21 END OF THE MATTER.

22 THE COURT: ALL RIGHT. THANK YOU,
23 MR. LITTRELL.

24 MR. HANUSZ, ANYTHING TO ADD?

25 MR. HANUSZ: NOTHING TO ADD, YOUR HONOR.

1 THE COURT: THANK YOU.

2 THANK YOU FOR ANSWERING MY QUESTION
3 DIRECTLY.

4 MR. HANUSZ: I'LL DO MY BEST, YOUR HONOR.

5 THE COURT: MR. SHOBAKI?

6 MR. SHOBAKI: SO, FIRST, I JUST -- TO BE
7 CLEAR, MR. LITRELL DOES NOT SPEAK FOR THE GOVERNMENT
8 AS TO WHAT THE GOVERNMENT'S VIEWS OF WHAT THIS CASE
9 REALLY IS ABOUT ARE.

10 THE GOVERNMENT, OBVIOUSLY, AGREES WITH
11 THE TENTATIVE. I DO WANT TO MAKE A FEW POINTS --

12 THE COURT: WHAT ABOUT THE ISSUE THAT WAS
13 RAISED CONCERNING WHETHER THE ALLEGATIONS IN THE
14 INDICTMENT MATCH THE ARGUMENT ABOUT WHY THERE'S A FACT
15 ISSUE?

16 IN OTHER WORDS, WHETHER THE ALLEGATIONS
17 IN THE INDICTMENT ARE CONSISTENT WITH THE FACTUAL
18 DISPUTE AS TO WHETHER THERE WAS PERMISSION?

19 MR. SHOBAKI: PERMISSION FOR DEFENDANT SHIH OR
20 DEFENDANT MAI?

21 THE COURT: EITHER.

22 MR. SHOBAKI: WITH RESPECT TO DEFENDANT MAI,
23 THE WAY THAT THE INDICTMENT IS WRITTEN, MR. MAI WAS
24 GIVEN AUTHORIZED ACCESS BY CREE. THAT ACCESS WAS
25 GAINED THROUGH A FRAUDULENT SCHEME.

1 BUT FOR THE PURPOSES OF THIS MOTION, WE
2 CAN ASSUME THAT MR. MAI'S ACCESS WAS AUTHORIZED.

3 WITH RESPECT TO MR. SHIH, HE WAS NEVER
4 GIVEN AUTHORIZATION TO ACCESS CREE'S COMPUTERS.

5 AND TO THAT POINT, THERE'S ONE CITATION
6 FROM THE INDICTMENT THAT I FAILED TO INCLUDE IN OUR
7 PAPERS THAT IS IMPORTANT ON THIS, WHICH IS PARAGRAPH
8 13, PAGE 6 IN THE INTRODUCTORY ALLEGATIONS. AMONG
9 THOSE, WHEN DISCUSSING MICRO EX, WHICH IS MR. MAI'S
10 COMPANY, THERE IS AN ALLEGATION, ALSO, THAT MR. SHIH IS
11 NOT AN EMPLOYEE, AGENT OR OTHERWISE ASSOCIATED WITH
12 MICRO EX. THAT BEARS, IN PART, ON WHAT REALLY IS, AS
13 THE COURT RECOGNIZED, A FACTUAL MATTER RELATED TO
14 WHETHER SOMEHOW MR. MAI'S AUTHORIZATION WOULD TRANSFER
15 TO MR. SHIH.

16 BUT STEPPING BACK, YOUR HONOR, THIS --
17 THE POSITION TAKEN BY THE DEFENDANT HERE IS REALLY THE
18 NOSAL II DISSENT POSITION, WHICH WAS EXPLICITLY
19 REJECTED BY THE MAJORITY THERE.

20 IN BOTH NOSAL II AND POWER, THE ACCESS
21 WAS DONE USING AUTHORIZED CREDENTIALS. THOSE WERE
22 CREDENTIALS -- IN NOSAL II, THE CREDENTIALS OF SOMEBODY
23 WHO STILL WORKED THERE AT THE COMPANY WHOSE COMPUTERS
24 WERE ACCESSED.

25 IN POWER, IT WAS ACCESS USING THE

1 CREDENTIALS OF FACEBOOK USERS WHO HAD GIVEN THEM TO
2 POWER VENTURES.

3 SO IN BOTH OF THOSE SITUATIONS, YOU HAD
4 SOMEBODY WHO WAS AUTHORIZED TO HAVE ACCESS, HAD
5 CREDENTIALS TO GAIN ACCESS.

6 A THIRD PARTY WHO WAS UNAUTHORIZED USED
7 THOSE CREDENTIALS TO ACCESS THE SERVICE.

8 THOSE SITUATIONS ARE VERY DIFFERENT FROM
9 THE OTHER CASES DISCUSSED BEFORE, BREKKA AND NOSAL I IN
10 PARTICULAR.

11 IN THOSE CASES -- AND THE DEFENSE MUDDIED
12 THE WATER A LITTLE BIT ON THIS IN ARGUMENT.

13 IN THOSE CASES, THE USERS WHO ACTUALLY
14 ACCESSED INFORMATION AND TOOK IT AND USED IT OR GAVE IT
15 TO ANOTHER WERE THE AUTHORIZED USERS.

16 SO IN THOSE CASES, IT WAS INSIDERS AT
17 KORN/FERRY WHO GOT INFORMATION OFF KORN/FERRY'S
18 COMPUTERS AND THEN GAVE THAT TO NOSAL.

19 SO IN THAT SITUATION, THE COURT DEALT
20 WITH WHETHER THERE'S AN "EXCEEDS AUTHORIZATION" THERE.
21 AND THE COURT, TALKING ABOUT IT, SAID YOU CAN'T --
22 KORN/FERRY'S POLICIES CAN'T CREATE CRIMINAL LIABILITY
23 FOR AN OUTSIDER WHO IS HANDED INFORMATION BY INSIDERS
24 WHO, USING CREDENTIALS, TAKE THAT OFF THE SYSTEM.

25 THAT'S VERY DIFFERENT FROM THE SITUATION

1 HERE WHERE THE ALLEGATION IS THAT MR. MAI HAD
2 CREDENTIALS, AND THEN HE GAVE THEM TO AN OUTSIDER, AS
3 IN NOSAL II AND POWER, TO ACCESS THE COMPUTER.

4 THE COURT: IF I WERE TO ADHERE TO THE
5 TENTATIVE, IF I DID, RECOGNIZING -- AND I'LL REVIEW
6 PARAGRAPH 13, AS WELL AS THE OTHER CITATIONS AGAIN TO
7 THE INDICTMENT.

8 BUT IF I WERE TO ADHERE TO THAT VIEW AND
9 CONCLUDE THAT THERE A FACT ISSUE COULD BE PRESENTED
10 WITH RESPECT TO THE AUTHORIZATION, WHAT IS YOUR VIEW AS
11 HOW THAT FACT ISSUE COULD BE ADDRESSED PRIOR -- COULD
12 THAT FACT ISSUE BE ADDRESSED IN ANY FASHION PRIOR TO
13 TRIAL?

14 MR. SHOBAKI: NO, YOUR HONOR.

15 THE COURT: OKAY. DO YOU AGREE WITH THAT?

16 I KNOW YOU DISAGREE WITH PREMISE, BUT --

17 MR. LITRELL: I THINK, ULTIMATELY, THE -- I'M
18 NOT SURE I UNDERSTOOD THE COURT'S QUESTION.

19 THE COURT: WELL, THE QUESTION IS, I
20 UNDERSTAND THE POSITION YOU HAVE ADVANCED, INCLUDING
21 JUDGE -- I MEAN, JUDGE REINHARDT'S DISSENT IN ONE OF
22 CASES GOES THROUGH SOME OF THIS AS WELL.

23 BUT MY QUESTION IS, IF THERE WERE A
24 FACT -- IF I WERE TO ADHERE TO THE VIEW THAT A FACT
25 QUESTION IS PRESENTED CONCERNING ACCESS -- AUTHORIZED

1 ACCESS, COULD THAT BE RESOLVED OTHER THAN AT TRIAL?

2 MR. LITTRELL: WELL, THERE ARE CIRCUMSTANCES
3 WHERE, IF A FACT IS TRULY UNDISPUTED, THE COURT COULD
4 INCORPORATE THAT INTO ITS RULING. AND SO IF THAT WERE
5 THE CASE, YES. OTHERWISE, IF IT'S A TRUE FACT ISSUE,
6 THEN, NO.

7 THE COURT: NO, I UNDERSTAND -- THAT MUCH, I
8 KNOW.

9 I REALLY WAS WONDERING WHETHER YOU
10 ANTICIPATE THAT THERE WOULD BE A DEVELOPMENT OF
11 EVIDENCE BETWEEN NOW AND TRIAL THAT WOULD PERMIT AN
12 ASSESSMENT OF WHETHER THERE IS A GENUINE ISSUE OF
13 MATERIAL FACT ON FACT, WHETHER THE PARTIES MIGHT
14 STIPULATE OR --

15 MR. LITTRELL: I'M CERTAINLY OPEN TO THAT
16 POSSIBILITY.

17 BUT IN THE END, I REALLY DO THINK THIS
18 TURNS ON THE LEGAL DEFINITION OF WHAT UNAUTHORIZED
19 ACCESS IS. AND I THINK WE WIN BASED ON THE INDICTMENT
20 AS PLED.

21 THE COURT: OKAY. THANK YOU, MR. LITTRELL.

22 ALL RIGHT. I'LL ISSUE A WRITTEN RULING
23 ON THIS. THANK YOU.

24 MR. SHOBAKI: THANK YOU, YOUR HONOR.

25 THE COURT: WITH RESPECT TO THE BILL OF

1 PARTICULARS MOTION, WELL, I'D LIKE TO HEAR FROM YOU
2 ABOUT THIS.

3 I UNDERSTAND THE GOVERNMENT'S -- I DON'T
4 FIND -- MY TENTATIVE VIEW IS, THAT I DON'T FIND
5 COMPELLING, THE ARGUMENT OF -- THE PROCEDURAL ARGUMENTS
6 OR THE -- AND I NEED BETTER TO UNDERSTAND TWO THINGS.
7 I NEED TO UNDERSTAND WHY THE GOVERNMENT BELIEVES THAT
8 IT WOULD BE PREJUDICIAL IF IT WERE TO PROVIDE A --
9 PROVIDE GREATER SPECIFICITY THROUGH A BILL OF
10 PARTICULARS WITH RESPECT TO THE ITEMS THAT HAVE BEEN
11 IDENTIFIED. I THINK THERE'S SIX. ALTHOUGH, ITEM FOUR
12 HAS SUBPARTS.

13 AND I'D LIKE TO KNOW, FROM THE MOVING
14 PARTIES, IN LIGHT OF THE VOLUME OF DISCOVERY THAT THE
15 GOVERNMENT HAS IDENTIFIED AS HAVING BEEN PRODUCED,
16 WHAT -- WHY IT'S NECESSARY TO HAVE FURTHER
17 CLARIFICATION OF THE GOVERNMENT'S POSITION?

18 MR. SHOBAKI, WILL YOU BE ADDRESSING THIS
19 AS WELL?

20 MR. SHOBAKI: YES, YOUR HONOR.

21 THE COURT: LET ME HEAR FROM YOU FIRST.

22 MR. SHOBAKI: DID THE COURT HAVE A SPECIFIC
23 QUESTION?

24 THE COURT: SPECIFICALLY, WHAT I'D LIKE TO
25 UNDERSTAND IS THIS: IF THE MOTION WERE GRANTED AS TO

1 ANY OF THE SPECIFICS AS TO WHICH A BILL OF PARTICULARS
2 IS BEING SOUGHT, WHAT'S THE PREJUDICE TO THE
3 GOVERNMENT?

4 MR. SHOBAKI: WELL, IN THE FIRST INSTANCE, THE
5 PREJUDICE TO THE GOVERNMENT IS THAT THE GOVERNMENT IS
6 BEING FORCED TO DO A BUNCH OF WORK THAT IT'S NOT
7 REQUIRED TO DO BY LAW.

8 ALSO, WITH RESPECT TO THE CONSPIRACY
9 COUNT, THE UNITED STATES ISN'T REQUIRED TO ALLEGE A
10 SINGLE OVERT ACT, LET ALONE ALL OVERT ACTS WITH RESPECT
11 TO THAT CONSPIRACY. SO IT SETS THE GOVERNMENT IN A
12 POSITION OF HAVING TO DECIDE, RIGHT NOW, ISSUES WITH
13 RELATION TO THE CONSPIRACY THAT MAY BE DECIDED
14 DIFFERENTLY AS WE GET CLOSER TO TRIAL.

15 BUT THERE'S STILL DISCOVERY ONGOING. AND
16 IT WOULD BE FORCING THE GOVERNMENT TO, A, ARTICULATE
17 POSITIONS. AND, B, POTENTIALLY STICKING THE GOVERNMENT
18 WITH THOSE POSITIONS TO THE GOVERNMENT'S DETRIMENT.

19 THE COURT: WELL, TO THE EXTENT THAT THE
20 GOVERNMENT DOESN'T YET HAVE -- HASN'T COMPLETED
21 DISCOVERY, COULDN'T IT QUALIFY THE BILL OF PARTICULARS
22 IN THAT FASHION SAYING, BASED ON WHAT WE PRESENTLY KNOW
23 OR THAT -- THAT THE BILL OF PARTICULARS -- THE ACTS
24 WOULD INCLUDE, BUT NOT BE LIMITED TO?

25 MR. SHOBAKI: YOUR HONOR, AS A THRESHOLD

1 MATTER, SOME OF THE QUESTIONS ARE JUST NOT REALLY
2 PROPER QUESTIONS FOR A BILL OF PARTICULARS. THEY
3 APPEAR TO BE SEEKING SOME SORT OF EXPLANATION OR
4 HORNBOOK ON HOW THE LAW WORKS RELATED TO THESE MATTERS.

5 AND THE DISCOVERY THAT THE GOVERNMENT HAS
6 PROVIDED IS -- INDEED, EASILY PROVIDES THE ANSWERS TO
7 THESE QUESTIONS, AS DOES GOOGLE IN SOME RESPECTS.

8 FOR EXAMPLE, WITH RESPECT TO THE -- THE
9 KEY QUESTION HERE, AS I READ IT, LOOKING AT THEIR
10 PAPERS, IS THEY'RE WONDERING ABOUT THE ECCN, WHICH
11 RELATES TO THE LICENSE FOR EXPORT.

12 AND THE GOVERNMENT HAS PROVIDED THE
13 DISCOVERY IN COMPUTER SEARCHABLE FORM TO DEFENSE.

14 AND I HOPPED ON THE GOVERNMENT'S COPY OF
15 THE DATABASE AND SEARCHED FOR "ECCN." AND THERE ARE
16 FEWER THAN 500 OF THOSE 1.5 MILLION DOCUMENTS THAT
17 INCLUDE ECCN. IF YOU LIMIT IT BY OTHER TERMS, SUCH AS
18 "LICENSE," IT'S EVEN LOWER THAN THAT.

19 AND, QUITE READILY, WITHIN 20 MINUTES,
20 HOPPING INTO THE DATABASE, I WAS ABLE TO FIND DOCUMENTS
21 THAT DISCUSSED THE SPECIFIC ECCN'S AT ISSUE HERE.

22 THE COURT: I UNDERSTAND THAT.

23 LET ME -- THE FIRST ELEMENT OF THE BILL
24 OF PARTICULARS -- A PROPOSED -- THE REQUESTED BILL OF
25 PARTICULARS IS THE ITEMS THAT THE GOVERNMENT CONTENDS

1 DEFENDANTS CONSPIRED TO EXPORT.

2 MR. SHOBAKI: YES, YOUR HONOR. I THINK
3 THIS --

4 THE COURT: LET ME FINISH MY QUESTION.

5 WITH RESPECT TO THE TYPE OF SEARCH TO
6 WHICH YOU'VE JUST REFERRED, WOULD THAT SEARCH BE
7 FACILITATED IF THE ITEMS THEMSELVES HAD BEEN
8 IDENTIFIED?

9 MR. SHOBAKI: THE ITEMS -- SPECIFIC ITEMS ARE
10 IDENTIFIED IN THE INDICTMENT, YOUR HONOR, WHICH ARE THE
11 CREE WAFERS.

12 WHAT MORE IDENTIFICATION -- THAT'S THE
13 QUESTION THE GOVERNMENT HAS. THESE QUESTIONS DON'T
14 MAKE A LOT OF SENSE.

15 THE COURT: OKAY.

16 MR. SHOBAKI: THE GOVERNMENT IS NOT TRYING TO
17 BE DIFFICULT HERE. THE BILL OF PARTICULARS IS VERY
18 DIFFICULT TO PARSE AS TO WHY IT'S EVEN NECESSARY.

19 THE COURT: I UNDERSTAND THAT THE ALLEGATIONS
20 REFER TO, AS YOU JUST STATED THE -- YOU'RE REFERRING TO
21 THESE MMIC'S?

22 MR. SHOBAKI: YES, YOUR HONOR. I'M SORRY, THE
23 MMIC'S.

24 AND I SHOULD SAY "U.S. COMPANY B," AND
25 PERHAPS ASK THAT THAT BE A SUBSTITUTED FOR THE COMPANY

1 I JUST DESCRIBED.

2 THE COURT: THAT'S FINE, BUT -- WELL, I
3 THINK -- DO YOU BELIEVE THAT THE INDICTMENT IS --
4 ALLEGES SOLELY THAT THAT'S THE SOLE ITEM THAT COULD BE
5 THE BASIS FOR THE GOVERNMENT'S -- THE CHARGE?

6 MR. SHOBAKI: YOUR HONOR, WITH RESPECT TO
7 COUNT 2 OF THE INDICTMENT, THAT IS WHAT IS ALLEGED IN
8 COUNT 2. COUNT 2 GIVES TWO KEY FACTS NECESSARY FOR THE
9 DEFENSE, WHAT IT WAS, THE COMPANY B WAFERS, AND THE
10 PLACE TO WHICH THEY WERE EXPORTED, THE PEOPLE'S
11 REPUBLIC OF CHINA.

12 WITH RESPECT TO THE CONSPIRACY, AGAIN, I
13 GO BACK TO THE PRIOR POSITION. AGAIN, THIS SPECIFIC
14 EXPORT IS PART OF THE CONSPIRACY TOO.

15 THE COURT: SO LET ME ASK YOU A QUESTION,
16 SUPPOSE -- SO BASED ON WHAT YOU -- WHAT THE INDICTMENT
17 ALLEGES, WOULD THE GOVERNMENT BE PRECLUDED FROM SEEKING
18 TO INTRODUCE EVIDENCE ABOUT EXPORT TO A COUNTRY OTHER
19 THAN CHINA?

20 MR. SHOBAKI: WITH RESPECT TO COUNT 1?

21 THE COURT: OR 2.

22 MR. SHOBAKI: WITH RESPECT TO COUNT 1, NOT IF
23 THERE WAS EVIDENCE OF THAT. IF IT WAS EVIDENCE OF AN
24 EXPORT TO -- ANOTHER ILLEGAL EXPORT.

25 WITH RESPECT TO COUNT 2, COUNT 2

1 SPECIFICALLY REFERS TO AN EXPORT TO CHINA, AN EXPORT TO
2 CHINA THAT COULD, AS IN THIS CASE, GO THROUGH ANOTHER
3 COUNTRY BEFORE GETTING THERE.

4 SO TO THE EXTENT THERE COULD BE EVIDENCE
5 OF TRANSSHIPMENT, CERTAINLY THE GOVERNMENT COULD PUT ON
6 EVIDENCE OF EXPORTS TO OTHER COUNTRIES ON THE WAY TO
7 CHINA.

8 THE COURT: GOING BACK TO SOMETHING YOU SAID
9 EARLIER. LET'S SUPPOSE, HYPOTHETICALLY -- I THINK WHAT
10 YOU JUST SAID IS THAT THE GOVERNMENT -- THE GOVERNMENT
11 CONTENDS THAT THE INDICTMENT CHARGES AN EXPORT OF A
12 PARTICULAR DEVICE OR ITEMS TO CHINA.

13 MR. SHOBAKI: YES. COUNT 2 OF THE INDICTMENT
14 CERTAINLY DOES.

15 THE COURT: AND WITH THE QUALIFICATION THAT
16 YOU JUST MADE, IT COULD BE THAT EVIDENCE WILL SHOW THAT
17 THE ITEMS WENT FROM THE UNITED STATES TO ANOTHER -- TO
18 AN INTERIM COUNTRY AND THEN TO CHINA. BUT YOU WOULD
19 CONTEND THAT'S -- YOU WOULD SAY THAT'S STILL A SHIPMENT
20 TO CHINA.

21 IF THE BILL OF PARTICULARS WERE REQUIRED,
22 AND THE GOVERNMENT SAID, AT THE PRESENT TIME, WE'RE
23 TALKING ABOUT SHIPMENTS DIRECTLY OR INDIRECTLY TO CHINA
24 MADE BY THE DEFENDANTS, AND LATER THE GOVERNMENT
25 LEARNED -- BELIEVED IT LEARNED THAT THERE WERE

1 SHIPMENTS TO A COUNTRY OTHER THAN CHINA, THEN WHAT
2 WOULD HAPPEN?

3 WOULD THE GOVERNMENT THEN HAVE TO SEEK TO
4 REINDICT, OR WOULD THE GOVERNMENT NOT BE LIMITED BY
5 THE -- OR WOULD THAT FIT WITHIN THE LANGUAGE OF THE
6 CURRENT INDICTMENT?

7 HOW WOULD THAT PLAY OUT?

8 MR. SHOBAKI: THE CURRENT INDICTMENT DOES
9 ALLEGE THAT THE SCHEME WAS TO EXPORT. THE SCHEME
10 BETWEEN YI-CHI SHIH AND ISHIANG SHIN WAS TO DEVELOP A
11 FOUNDRY IN CHINA AND EXPORT MATERIALS TO CHINA.

12 SO WHETHER EXPORTS TO ANOTHER COUNTRY,
13 HONESTLY, YOUR HONOR, I HAVEN'T STUDIED THIS IN DEPTH
14 TO KNOW WHETHER IT WOULD BE ABSOLUTELY CONTAINED WITHIN
15 THE SCOPE OF THE CONSPIRACY. MY INSTINCT IS, THE
16 ANSWER IS PROBABLY, NO.

17 THE COURT: OKAY. IS THERE ANYTHING ELSE YOU
18 WANTED TO ADD AT THIS POINT?

19 MR. SHOBAKI: WITH RESPECT TO ANY OF THE
20 QUESTIONS THE COURT ASKED?

21 THE COURT: WELL, ANY OF THE BILL OF
22 PARTICULARS -- ANY OF THE ELEMENTS OF THE BILL OF
23 PARTICULARS WHERE YOU CONTEND, IF IT WERE IMPOSED ON
24 THE GOVERNMENT, IT WOULD BE INAPPROPRIATE.

25 MR. SHOBAKI: YOUR HONOR, WITH RESPECT TO SOME

1 OF THE -- I THINK THAT IF THE DEFENSE FIGURES OUT WHAT
2 THE ECCN IS, IT WILL PROBABLY SOLVE MOST OF THEIR
3 PROBLEMS.

4 AND I FEEL THAT, STANDING UP HERE, I'VE
5 GIVEN A PRETTY EASY ROADMAP FOR HOW TO FIND THAT.

6 I'D ALSO JUST NOTE, YOUR HONOR, THAT WITH
7 RESPECT TO THE MONOLITHIC MICROWAVE INTEGRATED
8 CIRCUITS, OR "MMIC'S," THE TERM THE COURT RAISED,
9 AGAIN, THIS IS NOT AN ARCANE QUESTION OF LAW OR
10 REGULATION.

11 THIS MORNING, BEFORE COMING TO COURT, I
12 TYPED "MMIC CCL" AND "BIS" INTO GOOGLE. AND THE FIRST
13 THING THAT POPPED UP WAS THE CCL ENTRY FOR MMIC'S AND
14 THE ASSOCIATED ECCN'S THAT MMIC'S COULD FALL INTO ON
15 THE BIS WEBSITE, WHICH IS A VERY HELPFUL WEBSITE WHEN
16 DEALING WITH EXPORT CONTROL ISSUES.

17 AGAIN, THAT'S A QUESTION THAT THE
18 INTERNET CAN ANSWER.

19 THE COURT: OKAY. THANK YOU, MR. SHOBAKI.

20 WHO IS GOING TO -- MR. HANUSZ?

21 MR. HANUSZ: I'M GOING TO ADDRESS THE COURT'S
22 QUESTION FIRST.

23 IN TERMS OF THE DISCOVERY, I THINK THE
24 GOVERNMENT AND THE DEFENSE HAVE A DIFFERENT VIEW OF
25 WHAT THE DISCOVERY SHOWS.

1 I, LIKE MR. SHOBAKI, HAVE DONE LOTS OF
2 SEARCHES IN THESE 1.5 MILLION PAGES OF DISCOVERY.
3 THERE IS NO REFERENCE THAT I HAVE SEEN ANYWHERE TO --
4 AND I THINK THE GOVERNMENT IS RIGHT. THE IMPORTANT
5 NUMBER IS THE ECCN, WHICH IS THE EXPORT CONTROL
6 CLASSIFICATION NUMBER. SO THAT'S IMPORTANT, YOUR
7 HONOR, BECAUSE THERE'S -- THESE REGULATIONS DON'T SAY
8 THAT THE SHIPMENT OF MMIC'S TO CHINA IS ILLEGAL OR THE
9 SHIPMENT -- THEY ARE VERY SPECIFIC IN TERMS OF COUNTRY,
10 IN TERMS OF TIME AND IN TERMS OF THE SPECIFICATION OF
11 THE OBJECT THAT'S BEING SHIPPED.

12 SO WHAT THE GOVERNMENT HAS NOT DONE IN
13 THIS INDICTMENT OR IN THE DISCOVERY IS SPECIFIED WHICH
14 REGULATIONS -- THE UNDERLYING REGULATIONS THAT ARE
15 BEING VIOLATED IN THIS CASE.

16 IT DOESN'T TALK ABOUT WHY THE LICENSE WAS
17 ISSUE -- WAS REQUIRED AND WHAT LICENSE WAS REQUIRED.
18 AND THAT'S REALLY THE KIND OF -- THAT'S THE BASIS FOR
19 COUNTS 1 AND COUNTS 2.

20 THE COURT: BEFORE WE GET TO THE REGULATIONS
21 ISSUE, WITH RESPECT TO THE FACT ISSUE, THE EECN NUMBERS
22 TO WHICH YOU HAVE REFERRED, WHAT DO YOU CONTEND THE
23 GOVERNMENT COULD DO OTHER THAN DO WHAT EACH OF YOU HAS
24 MENTIONED, WHICH IS DOING A SEARCH -- A WORD SEARCH OF
25 THE DOCUMENTS AND REVIEWING THE EECN NUMBERS THAT ARE

1 LOCATED BY THAT SEARCH?

2 MR. HANUSZ: I THINK THE GOVERNMENT COULD
3 PROVIDE THE ECCN NUMBERS CORRESPONDING TO THE ITEMS IT
4 CLAIMS WERE SHIPPED TO CHINA.

5 YOUR HONOR, IF I MAY?

6 THE POINT OF THE MOTION FOR A BILL OF
7 PARTICULARS IS TO PREVENT SURPRISE AT TRIAL.

8 WHAT WE HAVE NO INSIGHT INTO IS TO WHAT
9 SPECIFIC REGULATIONS.

10 THE GOVERNMENT SPELLED OUT -- DID A NICE
11 INTRO IN THE INDICTMENT, BUT THE INDICTMENT DOESN'T
12 SPECIFY WHAT LICENSES WERE REQUIRED AND WHY THEY WERE
13 REQUIRED. THAT'S THE GOVERNMENT'S -- THE GOVERNMENT
14 HAS TO PROVE THAT AT TRIAL. CONSPIRACY COUNT OR NO
15 CONSPIRACY COUNT, THE GOVERNMENT HAS TO PROVE THAT.

16 THE COURT: WELL --

17 MR. HANUSZ: SO, YOU KNOW, WE ARE ASKING FOR
18 REAL BASIC INSIGHT --

19 THE COURT: JUST A MINUTE.

20 WITH RESPECT TO THE REGULATIONS, DOES THE
21 GOVERNMENT HAVE TO PROVE -- ARE YOU SAYING THE
22 GOVERNMENT WOULD HAVE TO PROVE A LEGAL ISSUE AT TRIAL,
23 OR THAT THAT WOULD BE PART OF JURY INSTRUCTIONS OR SOME
24 OTHER ELEMENT?

25 MR. HANUSZ: I THINK THE GOVERNMENT NEEDS TO

1 SHOW THAT THESE REGULATIONS AND THESE RULES ARE
2 APPLICABLE TO THE ITEMS AT ISSUE.

3 THE COURT: IS THAT A FACT QUESTION FOR THE
4 JURY OR A LEGAL ISSUE?

5 MR. HANUSZ: I THINK IT'S ULTIMATELY -- YOU
6 KNOW, YOUR HONOR, I THINK IT'S BOTH.

7 BUT THE BIGGER THING IS, IN TERMS OF THE
8 DEFENSE'S ABILITY TO PREPARE FOR TRIAL AND TO NARROW
9 DOWN WHAT THIS CASE IS ABOUT. THAT'S THE REAL ISSUE
10 HERE. AND OUR INABILITY TO DO THAT BECAUSE OF THE
11 GOVERNMENT'S REFUSAL TO DISCLOSE WHAT IT BELIEVES ARE
12 THE PARTICULAR REGULATIONS AT ISSUE HERE, AND WHY THESE
13 ITEMS FALL UNDER THOSE PARTICULAR REGULATIONS.

14 THE COURT: JUST A MINUTE.

15 IF YOU EXAMINED THE DISCOVERY THAT'S BEEN
16 PRODUCED, AND DID A WORD SEARCH LIKE THE ONES WE'VE
17 BEEN DISCUSSING, AND IDENTIFIED THE EECN NUMBERS, AND
18 THEN DID YOUR OWN EVALUATION OF THE REGULATIONS, AS YOU
19 INTERPRET THEM AND AS THEY APPLY, WOULD THAT BE A BASIS
20 UPON WHICH YOU COULD BRING A MOTION TO DISMISS BASED ON
21 THE FACT THAT THERE'S NO SHOWING THAT THESE REGULATIONS
22 WERE VIOLATED?

23 MR. HANUSZ: I THINK -- YOUR HONOR, I THINK WE
24 COULD.

25 THE KIND OF FOUNDATIONAL ISSUE IS, WHAT

1 THE NUMBERS ARE AND WHAT NUMBERS APPLY.

2 IT'S A VERY COMPLICATED -- THESE ARE VERY
3 COMPLICATED REGULATIONS.

4 AND ONE REGULATION REFERS TO ANOTHER,
5 WHICH REFERS TO ANOTHER, WHICH REFERS TO ANOTHER. AND
6 THEY GET SO SPECIFIC. THESE REGULATIONS ARE INCREDIBLY
7 SPECIFIC. BUT WE DON'T HAVE THE INFORMATION FROM THE
8 GOVERNMENT IN TERMS OF WHY THESE ITEMS ARE CONTROLLED.
9 AND THAT'S WHAT WE'RE ASKING FOR.

10 THE COURT: OKAY. THANK YOU, MR. HANUSZ.

11 DO YOU HAVE ANYTHING TO ADD?

12 MR. LITTRELL: YES, YOUR HONOR.

13 AND I HAVE SOMETHING I -- I DON'T SEE A
14 DOCUMENT CAMERA HERE.

15 OKAY. THAT'S SOMETHING THE COURT CAN
16 SEE.

17 SO JUST TO ADDRESS A COUPLE OF THINGS
18 REALLY BRIEFLY. THIS IS A CHART THAT'S PUT OUT BY THE
19 DEPARTMENT OF COMMERCE. AND IT'S PART OF THE E.A.R.,
20 THE REGULATIONS THAT WOULD -- THAT THE GOVERNMENT SAYS
21 APPLIES.

22 AND THIS, BASICALLY, TELLS AN EXPORTER
23 WHAT STEPS THEY MUST TAKE TO DETERMINE WHETHER THEIR
24 ITEM IS SUBJECT TO THE E.A.R. AND WHAT LICENSE IS
25 REQUIRED.

1 AND AS THE GOVERNMENT POINTS OUT, THE
2 ECCN IS THE CRITICAL INFORMATION THERE.

3 NOW, WHEN THE GOVERNMENT PRESENTED THIS
4 CASE TO THE GRAND JURY, IT HAD TO HAVE TOLD THE -- IF
5 THERE'S AN AGREEMENT, A CRIMINAL CONSPIRACY TO EXPORT
6 AN ITEM TO CHINA - AND THAT'S THE ONLY THING THAT I'M
7 CONCERNED ABOUT WITH COUNT 1 - THE OBJECT OF THAT
8 CONSPIRACY HAS TO HAVE BEEN TO EXPORT SOMETHING VERY
9 SPECIFIC. IT CERTAINLY LOOKS LIKE THE ITEMS THAT THE
10 GOVERNMENT ALLEGES WERE THE OBJECT OF THIS CONSPIRACY
11 TO EXPORT WERE THE MMIC WAFERS THAT ARE NAMED IN COUNT
12 2. AND IT'S POSSIBLE THAT WE COULD IDENTIFY THE
13 SPECIFICATIONS OF THOSE MMIC'S, LOOK THROUGH THE EXPORT
14 REGULATIONS AND TAKE A GUESS, MAYBE EVEN AN EDUCATED
15 GUESS ABOUT WHICH ECCN APPLIES TO THOSE WAFERS.

16 FROM THAT POINT, WE COULD GO THROUGH THIS
17 DECISION TREE AND MAKE JUDGMENT CALLS AS IF WE WERE THE
18 EXPORTER AND DRAW OUR OWN CONCLUSIONS ABOUT WHAT WE
19 THINK THE GOVERNMENT MIGHT BE ALLEGING HERE.

20 THE PROBLEM IS, WE MIGHT BE WRONG.

21 AND EVEN NOW THE GOVERNMENT IS MAKING
22 STATEMENTS THAT SUGGEST THAT, IT BELIEVES THAT IT COULD
23 DEVELOP EVIDENCE, SUBSEQUENT TO TODAY, AND CHANGE ITS
24 THEORY OF THE CASE.

25 AND WE -- IF THAT HAPPENS, WE ARE -- WE

1 WILL BE COMPLETELY AMBUSHED AT TRIAL.

2 THE COURT: THAT WAS IN RESPONSE TO ONE OF MY
3 QUESTIONS. I DON'T THINK THE GOVERNMENT SAID THAT
4 OTHERWISE.

5 MR. LITTRELL: WELL, WHAT -- THE COURT ASKED A
6 VERY SPECIFIC QUESTION ABOUT WHETHER IF -- IF THE
7 GOVERNMENT WAS -- LEARNED THAT AN ITEM WAS EXPORTED TO
8 A DIFFERENT COUNTRY, COULD IT INCORPORATE THAT IN THE
9 INDICTMENT? AND I THINK THE GOVERNMENT WAS RIGHT TO
10 SAY, NO.

11 HOWEVER, THIS -- THE POSITION THEY'RE
12 TAKING TODAY LEAVES OPEN THE POSSIBILITY THAT THEY
13 COULD ARGUE AT TRIAL THAT THERE WAS A CONSPIRACY TO
14 EXPORT SOMETHING OTHER THAN THE WAFERS THAT ARE
15 IDENTIFIED IN COUNT 2.

16 IF WE'RE WRONG ABOUT THAT, IF THE
17 GOVERNMENT INTENDS TO PRESENT A CONSPIRACY WITH THE
18 OBJECT TO IDENTIFY THE SPECIFIC WAFERS -- OR WAFER OR
19 WAFERS THAT ARE IDENTIFIED IN COUNT 2, THEN IT SHOULD
20 JUST SAY SO THAT WE CAN GET PREPARE FOR TRIAL AND
21 RETAIN THE EXPERTS THAT WE WOULD NEED TO RETAIN IN
22 ORDER TO GO THROUGH THIS PROCESS IN AN EDUCATED WAY.

23 NOW, I SHOULD NOTE, THEY HAVE SAID THAT
24 THIS IS NOT REQUIRED, AND THAT IT WOULD BE VERY EASY
25 FOR US TO GO THROUGH THE DISCOVERY AND FIGURE OUT WHICH

1 ECCN APPLIES. AND IT SOUNDS LIKE THEY HAVE DONE THAT.
2 BUT HERE'S WHY THAT'S NOT SUFFICIENT:

3 WE WOULD GO THROUGH THAT, AND WE CAN MAKE
4 AN EDUCATED GUESS. BUT WHAT WE DON'T ACTUALLY KNOW IS
5 WHETHER WE'RE RIGHT, WHETHER THEY INTEND TO EXPAND THE
6 SCOPE OF THE CONSPIRACY, WHETHER THEY WANT TO CHANGE
7 THEIR THEORY SUCH THAT A DIFFERENT LICENSE IS REQUIRED
8 AT TRIAL THAN THE LICENSE THAT THEY TOLD THE GRAND JURY
9 WOULD HAVE BEEN REQUIRED. AND THAT WOULD BE A
10 CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

11 ALL WE'RE ASKING IS THAT THEY GIVE US THE
12 SAME INFORMATION THAT THEY GAVE TO THE GRAND JURY.

13 AND, REALLY, IT COMES TO THE ECCN, WHICH
14 I THINK THE GOVERNMENT COULD DO TODAY.

15 THE COURT: ALL RIGHT. THANK YOU,
16 MR. LITTRELL.

17 MR. SHOBAKI?

18 MR. SHOBAKI: YOUR HONOR, TO BE CLEAR, THE
19 UNITED STATES HAS NOT REFUSED TO DISCLOSE THE BASIS OF
20 THE CHARGES. THAT BASIS IS DISCLOSED IN DISCOVERY. IT
21 IS DISCLOSED IN DISCOVERY, INCLUDING, AMONG OTHER
22 THINGS, DEPARTMENT OF COMMERCE DOCUMENTS EVALUATING THE
23 EXPORTED GOODS AND INCLUDING LICENSE DETERMINATIONS,
24 WHICH ARE AMONG THE DOCUMENTS THAT, IF YOU DID THE
25 SEARCH THAT I DESCRIBED BEFORE, YOU WOULD FIND.

1 THE COURT: YOU CONTEND THAT THOSE DOCUMENTS
2 IDENTIFY THE APPLICABLE REGULATIONS?

3 MR. SHOBAKI: THEY IDENTIFY THE ECCN AND THE
4 APPLICABLE REGULATIONS.

5 AND, INDEED, THEY ANSWER EVERY QUESTION
6 ON THIS FLOW CHART. AND THEY'RE SITTING THERE IN THE
7 DISCOVERY.

8 THE COURT: IF AN INDICTMENT CHARGES SOMEBODY
9 WITH A VIOLATION OF A STATUTE, THE INDICTMENT
10 IDENTIFIES THE STATUTE.

11 DO YOU AGREE WITH THAT?

12 MR. SHOBAKI: YES.

13 THE COURT: I MEAN, AS A GENERAL MATTER. I'M
14 NOT ASKING ABOUT EVERY POTENTIAL CONSPIRACY. I'M NOT
15 SAYING THAT, IN A CONSPIRACY COUNT, NECESSARILY EVERY
16 OTHER POTENTIAL STATUTE MAY EVERY TIME BE IDENTIFIED.
17 BUT, IN GENERAL, THAT WOULD BE THE CONCEPT.

18 NOW, REGULATIONS ARE DIFFERENT THAN
19 STATUTES IN THAT THEY CAN BE MORE VOLUMINOUS. THEY CAN
20 BE. NOT ALWAYS, BUT THEY CAN BE.

21 AND I DON'T THINK VIOLATING -- THE
22 VIOLATION OF A REGULATION ITSELF, I DON'T THINK WOULD
23 BE -- IS A CRIME. WHAT WOULD BE A CRIME WOULD BE, IF
24 THERE'S A STATUTE THAT SAYS, BY VIOLATING THIS
25 REGULATION, YOU HAVE COMMITTED A CRIME.

1 DO YOU AGREE WITH THAT?

2 MR. SHOBAKI: YES, YOUR HONOR.

3 AND THAT'S COMMON IN MANY AREAS OF THE
4 CRIMINAL LAW, CLEAN AIR ACT. THEY INCORPORATE AND MAKE
5 CRIMINALIZED VIOLATIONS OF REGULATIONS.

6 THE COURT: I UNDERSTAND.

7 SO I GUESS THE -- WHAT I'M -- WHAT I WANT
8 TO BE -- I THINK THE QUESTION I HAVE REALLY IS THIS:

9 IS THERE REALLY A MYSTERY AS TO WHICH
10 REGULATIONS ARE AT ISSUE?

11 I UNDERSTAND THAT ANYBODY CAN GO THROUGH
12 THE DISCOVERY. BUT WHEN GOVERNMENT EVALUATED THIS
13 MATTER, PRESUMABLY, YOU THOUGHT ABOUT THE REGULATIONS
14 AND THE -- WHICH ONES WOULD APPLY. AND YOU'VE PRODUCED
15 DISCOVERY WHICH IDENTIFIES REGULATIONS. AND WITHOUT --
16 I UNDERSTAND THAT AS THE -- AS YOU COMPLETE YOUR
17 PREPARATION FOR THE TRIAL, YOU MIGHT HAVE ADDITIONAL
18 INSIGHTS, BUT I -- IS THERE A REASON THAT THERE HAS TO
19 BE ANY DOUBT ON BOTH SIDES AS TO, AT THE MOMENT, WHICH
20 REGULATIONS APPEAR RELEVANT?

21 MR. SHOBAKI: YOUR HONOR, THERE'S NO DOUBT.
22 WE CITE THE REGULATIONS IN THE INDICTMENT. AND IN
23 DISCOVERY, WE PROVIDE THE COMMERCE DOCUMENTS THAT
24 INCLUDE AN EVALUATION OF THE GOODS AND WHAT -- WHETHER
25 THEY REQUIRE AN EXPORT LICENSE.

1 THE COURT: THEN WHAT WOULD BE THE PREJUDICE
2 OF SAYING THE SAME THING IN A BILL OF PARTICULARS?

3 MR. SHOBAKI: YOUR HONOR, THIS ISN'T CIVIL
4 DISCOVERY. WE'RE NOT REQUIRED TO ANSWER
5 INTERROGATORIES. WE GAVE THEM THE INFORMATION.

6 THE COURT: WELL, I'M NOT ASKING ABOUT
7 INTERROGATORIES. JUST RESTATING WHAT'S IN THE
8 INDICTMENT, HERE'S THE -- ALL RIGHT. I'LL REFLECT ON
9 THIS.

10 MR. SHOBAKI: THANK YOU, YOUR HONOR.

11 THE COURT: THANK YOU FOR YOUR HELP.

12 I THINK I UNDERSTAND THE DISPUTE HERE.

13 IS THERE SOMETHING NEW?

14 MR. LITTELL: IF I COULD JUST SAY, IF THE
15 GOVERNMENT COULD SPECIFY THE BATES RANGE OF THE EXACT
16 REPORT THAT IT IS PLEDGING SETS FORTH THE ECCN, IT
17 ESSENTIALLY WOULD DO THE SAME THING.

18 THE COURT: PERHAPS THE TWO SIDES CAN CONFER.
19 MAYBE YOU CAN REACH SOME AGREEMENT.

20 BUT LET ME KNOW WITHIN A WEEK IF YOU'VE
21 BEEN ABLE TO DO THAT, BUT --

22 MR. SHOBAKI: THE UNITED STATES IS HAPPY TO
23 PROVIDE THE BATES NUMBERS THAT CORRESPOND TO THE
24 DEPARTMENT OF COMMERCE DOCUMENTS.

25 THE COURT: ALL RIGHT. THAT MAY SOLVE THE

1 PROBLEM.

2 MR. LITTRELL: AGAIN, I JUST WANT TO MAKE THE
3 RECORD CLEAR. THE GOVERNMENT, AS IT SITS HERE TODAY,
4 KNOWS WHICH ECCN'S THIS CASE IS BASED ON. THEY ARE
5 TELLING US WE CAN FIND THAT INFORMATION, BUT THEY WON'T
6 TELL US WHAT IT IS. AND IT IS REALLY ABOUT THEM TRYING
7 TO LEAVE OPTIONS OPEN TO PROVE SOMETHING DIFFERENT AT
8 TRIAL THAN WHAT THEY PROVED TO THE GRAND JURY. THEY
9 SHOULDN'T HAVE THE OPPORTUNITY TO DO THAT.

10 THE COURT: I UNDERSTAND.

11 WHAT I'D LIKE YOU TO DO IS TO CONFER, AND
12 THEN FILE A JOINT REPORT IN A WEEK AS TO WHETHER THERE
13 ARE ANY OPEN ISSUES. I'M NOT ASKING YOU FOR
14 REBRIEFING. I JUST WANT TO KNOW WHETHER ANY ISSUES
15 HAVE BEEN RESOLVED.

16 CAN YOU DO THAT?

17 MR. HANUSZ: WE CAN, YOUR HONOR.

18 MR. SHOBAKI: YES, YOUR HONOR.

19 THE COURT: THANK YOU.

20 THERE'S ANOTHER MATTER WHICH CONCERNS THE
21 DISCUSSION WE'VE HAD IN THE PAST ON THE GOVERNMENT'S
22 APPLICATION THAT I CONDUCT CERTAIN MATTERS IN CAMERA.

23 THE GOVERNMENT SENT A LETTER. THERE WAS
24 A RESPONSE TO THE LETTER IN THE DOCKET, SO -- BUT WHICH
25 I'M GOING TO GET TO.

1 TO THE EXTENT, MR. SHOBAKI OR MS. HEINZ,
2 I ENTER AN AREA WHERE YOU THINK IT IS SOMETHING THAT
3 SHOULD BE DISCUSSED IN AN IN CAMERA SESSION, I'D LIKE
4 YOU TO LET ME KNOW THAT.

5 BUT I'M STARTING WITH THE GOVERNMENT'S
6 LETTER, WHICH IS IN THE PUBLIC DOCKET, AND THE
7 RESPONSE, AND THEN THE BRIEFING WITH RESPECT TO THE
8 ISSUE OF WHETHER -- OF WHO HAS TO SIGN A PARTICULAR
9 AUTHORIZATION, WHETHER IT'S THE HEAD OF THE AGENCY OR
10 NOT. THAT'S BEEN BRIEFED.

11 IS THAT AN ISSUE ON WHICH THE GOVERNMENT
12 CONTENDS THERE SHOULD BE IN CAMERA DISCUSSIONS?

13 MS. HEINZ: YOUR HONOR, I BELIEVE THE PARTIES
14 HAVE OFFERED A BRIEFING ON THE LAW ON THE LEGAL PART OF
15 THIS ISSUE. AND THE ISSUE IS A PRETTY NARROW ONE.
16 IT'S, BASICALLY, WHAT IS THE IDENTITY OR POSITION OF
17 THE PERSON WHO HAS TO SIGN A SUPPORTING DECLARATION?

18 THAT LEGAL PART OF IT AND THAT LEGAL
19 ANALYSIS IS -- CERTAINLY DOES NOT HAVE TO BE ADDRESSED
20 IN CAMERA.

21 IF WE GO MUCH FURTHER THAN THAT, WE MIGHT
22 STRAY INTO TERRITORY WHERE I MIGHT SAY WE NEED TO BE IN
23 CAMERA.

24 THE COURT: LET ME ASK YOU THIS QUESTION:
25 DOES THE GOVERNMENT CONTEND THAT THE IDENTITY OF THE

1 PERSON OR PERSONS WHO SIGNED THE DOCUMENT -- IN OTHER
2 WORDS, THE TITLE OF THAT PERSON IS AN IN CAMERA ISSUE?

3 MS. HEINZ: YES, YOUR HONOR.

4 THE COURT: SO LET ME ASK YOU THIS QUESTION:
5 I UNDERSTAND THE PARTIES DISPUTE ABOUT WHO IS
6 AUTHORIZED TO SIGN SUCH A DOCUMENT, AND I UNDERSTAND
7 THAT PRESENTS A LEGAL ISSUE.

8 WHAT I'M A LITTLE UNCLEAR -- WHAT I'M
9 THINKING ABOUT IS THIS -- WELL, IF THE DEFENDANT'S
10 POSITION WERE ADOPTED -- THAT IS TO SAY, IF I WERE TO
11 DETERMINE THAT THE DEFENDANTS ARE CORRECT AS TO WHO HAS
12 TO SIGN SUCH A DOCUMENT AND, HYPOTHETICALLY, THAT
13 PERSON OR THE PERSON WITH THAT TITLE SIGNED THAT
14 DOCUMENT, THEN THERE WOULDN'T HAVE BEEN A JUSTICIABLE
15 ISSUE TO BEGIN WITH.

16 SO MY QUESTION REALLY IS, HOW DO I -- HOW
17 DO I DETERMINE WHETHER THERE'S A JUSTICIABLE ISSUE?

18 I DO THAT IN CAMERA?

19 AND THEN IF I -- IF I DETERMINE THEN
20 THERE IS A JUSTICIABLE ISSUE, WOULDN'T THAT, IN EFFECT,
21 DISCLOSE THAT SOMEBODY, OTHER THAN THE PERSON THAT THE
22 DEFENDANTS CONTEND HAS TO SIGN IT, SIGNED IT?

23 MS. HEINZ: YOUR HONOR, TO ANSWER THE FIRST
24 QUESTION, IS THERE A JUSTICIABLE ISSUE, THE GOVERNMENT
25 WOULD POINT TO THE MOTION ITSELF, WHICH IS CLASSIFIED

1 AND FILED IN CAMERA AND UNDER SEAL.

2 SO BY EXAMINING THE MOTION ITSELF, THE
3 COURT -- THE GOVERNMENT BELIEVES THE COURT COULD
4 DETERMINE WHETHER OR NOT THERE IS A JUSTICIABLE ISSUE.

5 THE COURT: WELL, SUPPOSE -- AGAIN, JUST
6 HYPOTHETICALLY, SUPPOSE THAT I AGREED WITH THE --
7 DETERMINED THAT THE LAW REQUIRES THE PERSON IDENTIFIED
8 BY DEFENDANTS HAVE SIGNED THE DOCUMENT. AND SUPPOSE,
9 HYPOTHETICALLY, I MAKE AN IN CAMERA REVIEW, AND I
10 DETERMINE THAT THE PERSON WHO SIGNED THE DOCUMENT WAS
11 NOT THE PERSON THAT I'VE DETERMINED, AS A LEGAL MATTER,
12 SHOULD HAVE SIGNED THE DOCUMENT. THEN I ACCEPT YOUR
13 POSITION THAT THERE WOULD BE A JUSTICIABLE -- WELL, I'D
14 HAVE TO FIRST DETERMINE WHO SIGNED THE DOCUMENT TO
15 DETERMINE IF THERE'S A JUSTICIABLE ISSUE. BECAUSE IF
16 THE PERSON WHO SIGNED THE DOCUMENT IS THE PERSON THAT
17 DEFENDANTS CONTEND SHOULD HAVE SIGNED IT, THEN THERE
18 WOULD BE NO DISPUTE.

19 IF THE PERSON IS NOT, THERE WOULD BE A
20 DISPUTE.

21 DO YOU FOLLOW ME?

22 MS. HEINZ: I DO FOLLOW YOU, YOUR HONOR.

23 THE COURT: SO BACK TO MY QUESTION. UNDER
24 ARTICLE III, I THINK I HAVE JURISDICTION TO DECIDE
25 DISPUTED ISSUES, BUT I DON'T KNOW EXACTLY HOW TO

1 PROCEED HERE GIVEN THAT SOME THINGS ARE IN CAMERA AND
2 SOME ARE NOT, AND THAT THE -- THERE ARE VARIOUS,
3 OBVIOUSLY, FLOW CHARTS HERE AS TO THE POTENTIAL
4 OUTCOMES OF THIS LEGAL ISSUE. BUT THERE IS AT LEAST
5 ONE PURSUANT TO WHICH IT COULD BE INFERRED THAT THE
6 PERSON WHO SIGNED THE DOCUMENT WAS NOT THE PERSON THAT
7 THE DEFENDANTS CONTEND SHOULD HAVE SIGNED IT. IT WAS A
8 DIFFERENT PERSON OR A PERSON WITH A DIFFERENT TITLE.
9 SO THAT'S --

10 MS. HEINZ: I THINK I'M FOLLOWING YOUR HONOR.

11 I THINK WE'RE STUCK ON A CLASSIFIED FACT,
12 AND THAT'S WHERE IT IS.

13 THE COURT: LET ME ASK YOU THIS: I KNOW THAT
14 I CAN EXAMINE THE DOCUMENT. AND I KNOW I CAN DETERMINE
15 WHO SIGNED THE DOCUMENT. OKAY. I KNOW THAT.

16 AND I KNOW THAT I CAN EVALUATE THE LEGAL
17 ISSUES AS TO WHO -- I DETERMINE MUST SIGN SUCH A
18 DOCUMENT. I KNOW THAT.

19 IF I DETERMINE THAT THE PERSON WHO SIGNED
20 THE DOCUMENT IS SUFFICIENT, BUT THAT THAT PERSON WAS
21 NOT THE PERSON WHO THE DEFENDANTS CONTEND SHOULD HAVE
22 SIGNED IT, THEN HOW IS THAT RULING ANNOUNCED?

23 IS IT ANNOUNCED?

24 MS. HEINZ: WELL, IT WOULD -- IT WOULD DEPEND
25 ON THE WORDING. AND I THINK THAT -- I THINK THAT THE

1 COURT COULD CONSULT WITH THE CLASSIFIED -- I'M SORRY,
2 THE CISO, THE CLASSIFIED INFORMATION SECURITY OFFICER,
3 ABOUT IF THE COURT WANTED TO ISSUE A PUBLIC DECISION ON
4 THE PUBLIC DOCKET, HOW THAT COULD BE PHRASED.

5 AND IF THE COURT WANTED TO SAY SOMETHING
6 FURTHER THAT WOULD REQUIRE IT TO BE A CLASSIFIED ORDER,
7 THEN IT WOULD HAVE TO BE A CLASSIFIED ORDER.

8 BUT I THINK THE -- I WOULD DEFER TO THE
9 CISO ON WHAT EXACTLY COULD BE INCLUDED IN AN ORDER.

10 THE COURT: LET ME ASK YOU A DIFFERENT
11 QUESTION OR PUTTING IT A DIFFERENT WAY.

12 IN LIGHT OF THE ISSUES ON THE -- THE
13 CONFIDENTIALITY ISSUES UNDER THE STATUTE, WOULD THAT
14 CREATE A JUSTICIABLE ISSUE ITSELF?

15 MEANING, THAT I COULD DETERMINE PUBLICLY
16 WHOM I THINK IS REQUIRED TO SIGN WITHOUT ANNOUNCING
17 PUBLICLY WHO SIGNED?

18 MS. HEINZ: IF YOUR HONOR MADE THE DECISION
19 THAT A, QUOTE, UNQUOTE, "HEAD OF THE DEPARTMENT" --
20 WHICH IS THE PHRASE THAT IS USED IN SOME OF THE CASES
21 AND WAS ALSO USED IN THE TURI CASE, WHICH IS THE
22 DISTRICT COURT CASE OUT OF ARIZONA. IF YOUR HONOR WERE
23 TO DETERMINE THAT IT NEEDED TO BE A HEAD OF THE
24 DEPARTMENT, THEN I -- I THINK THAT YOUR HONOR COULD
25 ISSUE A PUBLIC ORDER ON THE PUBLIC DOCKET SIMPLY SAYING

1 THAT YOUR HONOR HAD DETERMINED THAT.

2 IT'S SORT OF SIMILAR TO THE PUBLIC RULING
3 THAT WAS MADE IN THE TURI CASE -- IN THE U.S. V. TURI
4 CASE IN ARIZONA WHERE THE COURT ANNOUNCED THAT IT
5 BELIEVED THAT THE DECLARATION NEEDED TO BE SIGNED BY --
6 AND IT JUST IDENTIFIED AS A PERSON, AS A POSITION.

7 THE COURT: ALL RIGHT. IF I WERE TO MAKE
8 THE -- IF I PUBLICLY MADE THE -- RESOLVED THE DISPUTED
9 LEGAL ISSUE HERE AS TO WHO HAS TO SIGN, AND THEN I
10 WERE -- I DETERMINED THAT THAT PERSON HAD NOT SIGNED,
11 IS THAT SOMETHING THAT YOU THINK I WOULD HAVE TO
12 EVALUATE TOGETHER WITH THE CONFIDENTIALITY OFFICER AS
13 TO HOW THINGS WOULD THEN PROCEED?

14 MS. HEINZ: WELL, I -- THERE, PERHAPS, IS A
15 SECONDARY ISSUE, WHICH, AGAIN, I GUESS YOUR HONOR WOULD
16 NEED TO DECIDE, IS WHETHER OR NOT WHAT WAS SUBMITTED BY
17 THE GOVERNMENT IN SUPPORT OF THE MOTION WAS SUFFICIENT.
18 WAS IT A SUFFICIENT SHOWING, WHICH IS THE LANGUAGE THAT
19 IS IN CIPA. AND SO I THINK THAT WOULD BE ANOTHER --
20 MAYBE ANOTHER DECISION THERE THAT WOULD NEED TO BE
21 MADE.

22 MY UNDERSTANDING OF DEFENSE -- THE
23 DEFENDANT'S BRIEFING IS, IS THAT THEY BELIEVE THAT THE
24 TERM "SUFFICIENT SHOWING" AND THE NEED TO HAVE
25 SOMETHING SIGNED BY THE HEAD OF THE DEPARTMENT ARE

1 CO-EXTENSIVE, THAT THEY'RE THE SAME.

2 AND I THINK THE GOVERNMENT DISAGREES WITH
3 THAT, BUT I THINK THAT'S BEEN BRIEFED.

4 THE COURT: ALL RIGHT. THANK YOU.

5 WHO IS GOING --

6 MR. HANUSZ: I'LL CERTAINLY AT LEAST BEGIN,
7 YOUR HONOR.

8 YOUR HONOR, I DON'T -- I THINK THAT
9 ARTICLE III GIVES THE COURT AUTHORITY TO PROTECT THE
10 DEFENDANT'S DUE PROCESS RIGHTS IN THE COURSE OF
11 DISCOVERY.

12 I THINK THE GOVERNMENT'S DEFAULT IS THAT
13 EVERYTHING IS CLASSIFIED.

14 AND I SEE -- I KNOW -- I'M AWARE --
15 UNAWARE OF ANY SUPPORT SHOWING THAT -- REGARDING THE
16 IDENTITY OF THE PERSON, THEIR TITLE, WHY ALL OF THAT IS
17 CLASSIFIED. AND I THINK THIS ILLUSTRATES THE PROBLEM
18 THAT WE'VE TALKED ABOUT BEFORE IN THAT THE DEFENSE HAS
19 ABSOLUTELY NO INSIGHT INTO WHAT THE GOVERNMENT IS
20 DOING.

21 AND THE COURT -- WE APPRECIATE THE
22 POSITION THE COURT IS IN. BUT THE COURT, JUST LIKE THE
23 DEFENSE, IS FLYING BLIND IN TERMS OF PROTECTING
24 DR. SHIH AND MR. MAI'S DISCOVERY RIGHTS.

25 THE COURT: ALL RIGHT. I'LL REFLECT ON THIS.

1 I HAVE YOUR COMPETING POSITIONS. I
2 UNDERSTAND AS TO THE -- WHO HAS TO -- WHO MUST SIGN.
3 AND I'LL EVALUATE HOW I -- WHEN I RESOLVE THAT ISSUE,
4 HOW I WILL GO ABOUT DOING SO.

5 MEANING, ANNOUNCING THE DECISION, IF AT
6 ALL.

7 OR WHAT THE EFFECT OF A -- IF I ADOPT THE
8 DEFENDANT'S -- IF I AGREE WITH THE DEFENDANT'S
9 POSITION, HOW THAT WOULD BE IMPLEMENTED IN LIGHT OF
10 EVERYTHING ELSE. I'LL REFLECT ON IT.

11 MR. HANUSZ: VERY WELL, YOUR HONOR.

12 THE COURT: THE OTHER -- THE OTHER ISSUE
13 THAT'S RAISED BY THE -- WELL, FROM WHAT YOU HAVE JUST
14 SAID, MR. HANUSZ, THERE REMAINS -- I UNDERSTAND THERE
15 REMAINS A DISAGREEMENT AS TO WHAT SCOPE OF INFORMATION
16 SHOULD BE UNAVAILABLE TO THE DEFENDANTS.

17 AND MY QUESTION IS, PROCEDURALLY, DO YOU
18 ANTICIPATE ANY OTHER PROCESS, OTHER THAN THE ONE THAT'S
19 BEEN COMMENCED, PURSUANT TO WHICH I WOULD MAKE A
20 DETERMINATION -- RESOLVE THE DISPUTE?

21 MR. HANUSZ: YOUR HONOR, IT'S TOUGH TO ANSWER
22 THAT QUESTION WITHOUT HAVING ANY INSIGHT INTO WHAT THE
23 INFORMATION THAT'S WITHHELD CONSISTS OF.

24 I KNOW THE COURT HAD DISCUSSED BEFORE THE
25 DEFENSE MAKING SOME SORT OF PROFFER TO THE COURT.

1 WE'RE CONCERNED ABOUT THAT, YOUR HONOR. WE'RE
2 CONCERNED ABOUT THE PROFFER. WE'RE CONCERNED ABOUT
3 INADVERTENT DISCLOSURES, CERTAINLY NOT OF -- CERTAINLY
4 NOT WHAT THE COURT WOULD INTEND TO DO.

5 BUT I THINK WE'VE SEEN, BY THE FILING OF
6 THE MOTION THIS MORNING, WHICH WE'LL APPARENTLY DEAL
7 WITH IN A COUPLE OF WEEKS, THAT THE GOVERNMENT IS VERY
8 INTERESTED IN GIVING INSIGHT AS TO THE DEFENSE CASE.

9 AND WE DON'T HAVE TO PROVIDE, NOR SHOULD
10 WE BE REQUIRED TO PROVIDE, THAT INFORMATION. SO OUR
11 OBJECTION, YOUR HONOR, IS BROADER AND --

12 THE COURT: LET ME ASK YOU THIS QUESTION: THE
13 GOVERNMENT HAS CERTAIN DISCOVERY OBLIGATIONS IN A
14 CRIMINAL CASE, SPEAKING GENERALLY. AND TO THE EXTENT
15 THAT THE DEFENDANTS CONTEND THAT THE GOVERNMENT HASN'T
16 COMPLIED WITH ITS OBLIGATIONS, THERE ARE CERTAIN
17 REMEDIES YOU HAVE. I'M NOT TALKING ABOUT -- A CASE
18 THAT DOES NOT INVOLVE THE CONFIDENTIAL INFORMATION
19 PROCESS THAT'S AT ISSUE HERE. ALL RIGHT?

20 YOU AGREE WITH THAT?

21 MR. HANUSZ: SURE.

22 THE COURT: DOES ANY -- CAN ANY OF THAT --
23 WOULD ANY OF THAT PROCESS BE USEFUL IN TERMS OF
24 EVALUATING THE ISSUES RAISED ON THE CONFIDENTIAL SIDE
25 OF THIS MATTER?

1 MR. HANUSZ: I DON'T KNOW IF THE COURT IS
2 REFERRING TO A DISCOVERY MOTION.

3 THE COURT: IT COULD BE.

4 MR. HANUSZ: I THINK WE GET BACK TO THE SAME
5 PROBLEM WHERE -- WE'VE TRIED TO MEET AND CONFER WITH
6 THE GOVERNMENT. AND THE ANSWER TO EVERY QUESTION IS,
7 "THAT'S CLASSIFIED" OR "WE CAN'T TELL YOU THAT."

8 SO I DON'T THINK THE COURT NEEDS THAT
9 MOTION. WE CAN FILE IT, BUT I THINK WE'LL GET BACK TO
10 THE SAME PLACE.

11 THE COURT: YOU AGREE WITH THAT, MR. LITTRELL?

12 MR. LITTRELL: YEAH, I DO, YOUR HONOR.

13 THE COURT: LET ME ASK YOU THIS QUESTION:
14 GOING BACK TO THE ISSUE OF -- AND, MS. HEINZ, SAME
15 QUALIFICATION TO YOU AS MY PRIOR QUESTIONS. I'M NOT --
16 TO THE EXTENT THAT THERE'S A MATTER THAT YOU THINK
17 NEEDS TO BE HANDLED IN A NON-PUBLIC SETTING, THEN
18 YOU'LL TELL ME THAT.

19 DO YOU THINK THAT PART OF THE PROCESS
20 THAT I'M TO UNDERTAKE DURING THE CONFIDENTIAL IN CAMERA
21 PROCESS, DOES THAT INCLUDE AN ASSESSMENT OF WHAT
22 INFORMATION MIGHT BE SUBJECT TO DISCOVERY, ABSENT
23 CONFIDENTIALITY ON THE -- BY STATUTE?

24 DO YOU UNDERSTAND MY QUESTION?

25 MS. HEINZ: I'M SORRY, I ASSUME THAT'S MY

1 QUESTION?

2 THE COURT: IT IS.

3 AND QUALIFIED BY SAYING, YOU'RE NOT
4 REQUIRED TO ANSWER IT IF THIS IS SOMETHING THAT NEEDS
5 TO BE DISCUSSED IN CAMERA.

6 MS. HEINZ: I CAN ATTEMPT TO ANSWER IT BASED
7 ON, I THINK, THE BRIEFING THAT HAS ALREADY BEEN DONE,
8 IF I CAN TAKE THE LECTERN?

9 THE COURT: THAT'S FINE.

10 MS. HEINZ: YOUR HONOR, AS PART OF THE
11 EXCHANGE OF BRIEFING BETWEEN THE GOVERNMENT AND THE
12 DEFENSE ON THE ISSUE, THIS, OF COURSE, STARTED WITH THE
13 GOVERNMENT SENDING A LETTER TO THE DEFENSE SUMMARIZING
14 THE LEVEL FRAMEWORK FOR AN ANALYSIS OF A CIPA SECTION 4
15 MOTION.

16 ALL OF THAT LEGAL FRAMEWORK HAS ALREADY
17 GONE OVER TO THE DEFENSE. AND THE DEFENSE CAN RESEARCH
18 FOR THEMSELVES, AS I'M SURE THEY HAVE DONE, ABOUT THE
19 LEGAL FRAMEWORK FOR A CIPA SECTION 4 MOTION.

20 THAT LEGAL FRAMEWORK INCLUDES AN INITIAL
21 ANALYSIS BY THE COURT AS TO WHETHER OR NOT THE
22 PARTICULAR MATERIALS IN QUESTION WOULD BE SUBJECT TO
23 DISCOVERY UNDER TRADITIONAL DISCOVERY RULES.

24 THE COURT: OKAY. THAT'S FINE. I AGREE. I
25 WANTED TO CONFIRM THAT.

1 AND THEN DO YOU HAVE ANY VIEW AS TO OTHER
2 COURTS HAVE, UNDER THESE CONDITIONS, INVITED AN IN
3 CAMERA PROCESS WITH THE DEFENDANTS PURSUANT TO WHICH
4 THE DEFENDANTS CAN PROVIDE THE COURT WITH INFORMATION,
5 SUCH AS WHAT MR. HANUSZ WAS REFERRING TO, THAT MIGHT
6 FACILITATE MY REVIEW OF THE MATERIALS TO DETERMINE THAT
7 STEP ONE?

8 ARE THESE IN FACT DISCOVERABLE MATERIALS?

9 AND, IF SO, THEN ARE THEY PROTECTED,
10 NONETHELESS, AND ARE NOT PRODUCIBLE?

11 OR ARE THEY NOT DISCOVERABLE MATERIALS,
12 IN WHICH CASE THE SECRECY ISSUES DON'T HAVE TO BE
13 ADDRESSED?

14 DO YOU AGREE WITH THAT?

15 MS. HEINZ: YES, YOUR HONOR. I HAVE NOT
16 PERSONALLY PARTICIPATED IN A CASE WHERE THE DEFENSE
17 MADE A PROFFER OF, ESSENTIALLY, WHAT DEFENSES THEY
18 INTENDED TO MOUNT AT TRIAL.

19 BUT THE CASE LAW MAKES CLEAR THAT THAT
20 HAS BEEN DONE IN OTHER CASES, SOMETIMES IN WRITING,
21 SOMETIMES IN A HEARING. SO THAT THEN THE COURT CAN, AT
22 LEAST, HAVE THE BENEFIT OF THE DEFENSE PROVIDING
23 INFORMATION.

24 THE COURT: ALL RIGHT. THANK YOU.

25 MR. HANUSZ, I KNOW YOU JUST SAID -- I

1 UNDERSTAND WHAT -- I HEARD WHAT YOU JUST SAID. AND
2 I'VE HEARD -- YOU'VE SAID IT BEFORE CONCERNING, FOR
3 EXAMPLE, I MIGHT INADVERTENTLY -- IF THAT WERE DONE AND
4 I KNEW THAT INFORMATION, I MIGHT INADVERTENTLY DISCLOSE
5 IT, WHETHER IN A WRITTEN ORDER OR IN SOME OTHER ORAL
6 STATEMENT, SO THAT THE GOVERNMENT MIGHT HAVE SOMETHING
7 TO WHICH IT WAS NOT ENTITLED. I UNDERSTAND THAT RISK.

8 BUT WHAT'S YOUR VIEW ON WHAT -- DO YOU
9 THINK THAT THAT RISK IS SUCH THAT IT OUTWEIGHS HAVING
10 YOU, IN CAMERA, TELL ME OR PROVIDE IN WRITING
11 INFORMATION THAT I COULD USE TO ASSESS THE EVIDENCE AT
12 ISSUE HERE TO DETERMINE IF IT'S -- IT'S DISCOVERABLE
13 ABSENT THE NATIONAL SECRECY ISSUES?

14 MR. HANUSZ: I DON'T THINK THAT'S THE ONLY
15 RISK, YOUR HONOR. THAT IS ONE RISK, RIGHT. THE RISK,
16 JUST BY THE COURT'S QUESTIONS OF THE GOVERNMENT BASED
17 ON INFORMATION PROVIDED BY THE DEFENSE, THAT'S ONE
18 ISSUE.

19 THE OTHER ISSUE IS, YOU KNOW, DEFENSES
20 CAN, AND DO, KIND OF MORPH OVER TIME BASED ON
21 ADDITIONAL INFORMATION THAT THE COURT IS NOT GOING TO
22 HAVE THE BENEFIT OF.

23 THIRD, AND KIND OF RELATED TO THE SECOND
24 POINT --

25 THE COURT: CAN YOU DO IT MORE THAN ONCE, IF

1 THAT HAPPENED?

2 MR. HANUSZ: I THINK THERE ARE NUANCES. YOUR
3 HONOR IS A JUDGE. YOUR HONOR IS NOT DEFENSE COUNSEL.
4 YOUR HONOR IS NOT -- IS JUST -- THERE'S NO WAY -- I
5 DON'T THINK THE COURT CAN FULLY GET THE NUANCES.

6 YOUR HONOR, CAN I MAKE --

7 THE COURT: I'M NOT DISAGREEING WITH THAT.
8 I'M NOT SAYING, AS A PER SE MATTER, THAT CAN I LOOK AT
9 A DOCUMENT THE SAME WAY YOU MIGHT.

10 MY QUESTION IS, DO YOU THINK I COULD LOOK
11 AT THE DOCUMENT IN A MORE INFORMED WAY IF YOU PROVIDED
12 ME WITH SOME INFORMATION THAT MIGHT PERMIT ME TO SAY,
13 "OH, THIS WOULD OTHERWISE BE DISCOVERABLE"?

14 MR. HANUSZ: I THINK THE COURT WOULD CERTAINLY
15 BE MORE INFORMED THAN IT WOULD OTHERWISE BE. BUT I
16 DON'T THINK THAT THAT IS -- THAT THAT FULLY PROTECTS
17 DR. SHIH AND MR. MAI'S RIGHTS.

18 THE OTHER ISSUE -- I WOULD --

19 THE COURT: BY THE WAY, I WOULDN'T -- IF I
20 WERE TO PROCEED IN THAT FASHION, IT WOULDN'T BE WITH
21 THE DEFENDANTS WAIVING THE RIGHT TO OBJECT.

22 IN OTHER WORDS, IT WOULDN'T BE A WAIVER
23 OF THE CLAIM THAT THIS SHOULDN'T HAVE BEEN NECESSARY.
24 IT'S JUST A --

25 MR. HANUSZ: THE OTHER OPTION, YOUR HONOR,

1 WOULD BE - AND WE HAVE PROPOSED THIS TO THE GOVERNMENT
2 BEFORE - IS TO ALLOW THE DEFENSE COUNSEL TO GET THE
3 SECURITY CLEARANCES THAT WE NEED IN ORDER TO REVIEW THE
4 DOCUMENTS OURSELVES, BE SUBJECT TO THOSE PROCEDURES.
5 AND I THINK THAT IS -- THAT CERTAINLY HAS HAPPENED IN
6 PLENTY OF CASES WHERE FOLKS GO TO WASHINGTON AND REVIEW
7 DOCUMENTS IN A SKIFF OR REVIEW DOCUMENTS HERE IN A
8 SKIFF. IT HAPPENS WITH SOME FREQUENCY.

9 THE GOVERNMENT'S RESPONSE WAS, WELL, YOU
10 CAN'T FORCE US TO GIVE YOU -- BASICALLY, TO GIVE YOU
11 THAT CLEARANCE. BUT THERE'S NOTHING TO PREVENT THEM
12 FROM IT. SO THEY CAN CERTAINLY DO IT. WE CAN
13 CERTAINLY START THAT PROCESS.

14 THE COURT: DO YOU HAVE ANY INSIGHT AS TO HOW
15 LONG THAT TAKES?

16 MR. HANUSZ: I DON'T, YOUR HONOR.

17 BUT WE CERTAINLY -- WE SUGGESTED IT TWO
18 MONTHS AGO, AND WE'D BE HAPPY TO DO IT.

19 THE COURT: I HAVE TO MOVE ON TO OTHER MATTERS
20 IN A MINUTE.

21 MS. HEINZ, ANYTHING ON THAT ISSUE, THE
22 SECURITY CLEARANCE ISSUE?

23 FIRST, DO YOU KNOW HOW LONG IT WOULD
24 TAKE?

25 AND, SECOND, WHAT'S YOUR VIEW ON THE

1 MERITS?

2 MS. HEINZ: YOUR HONOR, THERE ARE TWO THINGS
3 THAT ARE REQUIRED TO REVEAL CLASSIFIED INFORMATION TO
4 SOMEONE, THE PROPER SECURITY CLEARANCE AND THE NEED TO
5 KNOW.

6 AND WITH RESPECT TO THE SPECIFIC
7 INFORMATION THAT IS UNDERLYING THE CURRENTLY PENDING
8 CIPA SECTION 4 MOTION, THERE IS NO NEED FOR DEFENSE
9 COUNSEL TO KNOW. SO EVEN IF THEY HAD A SECURITY
10 CLEARANCE, THAT INFORMATION COULD NOT BE DISCLOSED TO
11 THEM.

12 THE COURT: ARE YOU FAMILIAR WITH -- LET ME
13 ASK YOU THIS QUESTION:

14 IF IT WERE DETERMINED IN A CASE THAT A
15 DEFENSE COUNSEL -- DEFENSE COUNSEL HAD SECURITY
16 CLEARANCE. AND IF IT WERE DETERMINED THAT THE
17 INFORMATION WAS SOMETHING THAT SHOULD BE DISCLOSED.

18 YOU WITH ME SO FAR?

19 MS. HEINZ: YES.

20 THE COURT: IS THE DEFENSE COUNSEL PERMITTED
21 TO REDISCLOSE THAT TO THE CLIENT?

22 MS. HEINZ: TYPICALLY, NO, UNLESS THE CLIENT
23 HAS A SECURITY CLEARANCE, WHICH, IN THIS CASE, THEY DO
24 NOT.

25 AND IT WOULD BE UNLIKELY THAT THEY WOULD

1 EVER BE GRANTED ONE.

2 SO THE ANSWER WOULD BE, NO.

3 IF I MIGHT JUST, YOUR HONOR, BRIEFLY?

4 TYPICALLY, THE WAY SOMETIMES THIS WORKS
5 IS, THAT AFTER THE COURT HAS REVIEWED A CIPA SECTION 4
6 MOTION, AND IF THE COURT HAS GONE THROUGH ALL THE LEGAL
7 ANALYSIS AND THEN HAS DETERMINED, AT THE END OF THAT
8 ANALYSIS, THAT PART OF THAT INFORMATION NEEDS TO BE
9 DISCLOSED TO THE DEFENSE, THEN THE BALL COMES BACK TO
10 THE GOVERNMENT TO DECIDE HOW TO DISCLOSE IT, IF TO
11 DISCLOSE IT OR WHETHER TO APPEAL. AND THAT'S THE
12 PROCESS.

13 THE COURT: I UNDERSTAND.

14 HERE'S WHAT I'D LIKE YOU TO DO:

15 I'D LIKE YOU TO CONFER ON THE ISSUE WE'VE
16 TALKED ABOUT. AND LET ME KNOW IN A WEEK IF YOU HAVE
17 RESOLVED THE ISSUE WE'VE PREVIOUSLY DISCUSSED ON THE
18 BILL OF PARTICULARS.

19 ALSO, I WOULD LIKE THE DEFENSE TO REFLECT
20 ON MY QUESTION ABOUT AN IN CAMERA OPPORTUNITY, WHETHER
21 IT IS BY IN WRITING OR ORALLY OR BOTH, AS TO PROVIDING
22 THE COURT WITH MORE INSIGHT AS TO THE DEFENSE CURRENT
23 VIEWS AS TO WHAT INFORMATION YOU WOULD VOLUNTARILY
24 PROVIDE TO ME ABOUT POTENTIAL DEFENSES THAT MIGHT --
25 THAT YOU THINK WOULD FACILITATE OR COULD FACILITATE MY

1 REVIEW OF THE DOCUMENTS UNDER THE RULE 4 MOTION.

2 SO I'D LIKE TO HEAR FROM YOU WITHIN A
3 WEEK ON WHAT YOUR VIEW ON THAT IS.

4 AND I THEN CAN MAKE -- WELL, UPON
5 RECEIVING THOSE TWO THINGS, ONE, I CAN THEN PROCEED ON
6 THE BILL OF PARTICULARS MOTION, ONCE I HEAR WHAT
7 DISPUTES, IF ANY, REMAIN.

8 AND, SECOND, UPON RECEIVING THE DEFENSE
9 POSITION AS TO AN IN CAMERA PROCESS, I CAN DETERMINE
10 HOW NEXT -- HOW NEXT TO PROCEED ON THE RULE 4 MOTION,
11 THE CIPA MOTION.

12 AND I UNDERSTAND, MS. HEINZ, YOUR
13 POSITION THAT IF -- WHETHER OR NOT THE -- BUT, TO BE
14 CLEAR, MY POSITION IS NOT THAT BY AGREEING -- IF THE
15 DEFENDANTS ELECT TO PROVIDE IN CAMERA INFORMATION TO ME
16 ABOUT POTENTIAL DEFENSES OR OTHER MATTERS THAT THE
17 DEFENDANTS THINK WOULD BE USEFUL FOR ME TO HAVE AS I
18 REVIEW THE DOCUMENTS AT ISSUE, THAT IS NOT A WAIVER OF
19 THE DEFENDANT'S OBJECTIONS THAT THEY HAVE RAISED TO THE
20 PROCESS. IT'S JUST A MEANS PURSUANT TO WHICH I COULD,
21 POTENTIALLY, CARRY OUT THE PROCESS.

22 AND I UNDERSTAND, MS. HEINZ, YOUR POINT
23 THAT, WHETHER OR NOT THERE'S AN IN CAMERA PROCESS WITH
24 DEFENSE, AFTER I HAVE CONCLUDED MY REVIEW OF THE
25 DOCUMENTS UNDER RULE 4, I MAY DETERMINE THAT ALL OF

1 THEM SHOULD BE PRODUCED. I MAY DETERMINE NONE OF THEM
2 SHOULD BE PRODUCED. I MAY DETERMINE SOME OF THEM
3 SHOULD BE PRODUCED.

4 AND THAT COULD BE ON DIFFERENT GROUNDS
5 ONE, IF IT IS NOT DISCOVERABLE, THEN I DON'T HAVE TO
6 GET TO THE NATIONAL SECURITY ISSUE.

7 IF IT IS DISCOVERABLE, THEN I DO HAVE TO
8 GET TO THE NATIONAL SECURITY ISSUE.

9 I UNDERSTAND, THEREFORE, THAT IF I HAVE
10 DONE THAT ANALYSIS AND HAVE IDENTIFIED ONE OR MORE
11 DOCUMENTS THAT I HAVE DETERMINED SHOULD BE DISCLOSED,
12 THEN THE BALL IS IN THE GOVERNMENT'S COURT AS TO WHAT
13 TO DO NEXT.

14 AND THE GOVERNMENT MAY CONCLUDE TO --
15 WELL, I DON'T WANT TO ANTICIPATE WHAT THE GOVERNMENT
16 MIGHT DO, BUT I UNDERSTAND THAT.

17 MS. HEINZ: UNDERSTOOD. THANK YOU, YOUR
18 HONOR.

19 THE COURT: ANYTHING ELSE WE NEED TO DO TODAY?

20 MS. HEINZ: NOTHING FROM THE GOVERNMENT.

21 MR. HANUSZ: YOUR HONOR, THE COURT HAD ASKED A
22 QUESTION AS TO HOW LONG THE SECURITY CLEARANCE PROCESS
23 TAKES. I DON'T KNOW IF THERE WAS A CLEAR ANSWER TO
24 THAT.

25 THE COURT: DO YOU KNOW?

1 MS. HEINZ: I DON'T KNOW, YOUR HONOR.

2 IT'S NOT OVERNIGHT. SO IT TAKES SOME
3 TIME.

4 PROBABLY THE CISO WOULD HAVE AN IDEA
5 ABOUT THAT.

6 THE COURT: ALL RIGHT. I'LL SEE WHAT I CAN
7 LEARN.

8 OBVIOUSLY, YOU CAN INDEPENDENTLY INQUIRE.

9 MR. HANUSZ: WE'LL DO THAT, YOUR HONOR. THANK
10 YOU.

11 THE COURT: IF YOU LEARN SOMETHING IN THE NEXT
12 WEEK, PUT THAT IN YOUR REPORT AS WELL.

13 MR. HANUSZ: WILL DO.

14 THE COURT: THANK YOU.

15 MR. LITTRELL: JUST TO SAY ONE THING. IT'S
16 BEEN MENTIONED A FEW TIMES THAT THE COURT MAY CONSULT
17 WITH THE CISO. WE JUST OBJECT TO ANY EX PARTE
18 COMMUNICATION WITH THE CISO.

19 AND TO THE EXTENT IT'S DONE, WE ASK THAT
20 IT BE ON THE RECORD, AT LEAST.

21 THE COURT: ALL RIGHT.

22 MS. HEINZ: THE CISO WORKS FOR THE COURT. THE
23 CISO IS NOT CONNECTED TO EITHER PARTY. THE CISO IS
24 HIRED BY THE JUDGES.

25 MR. LITTRELL: TO THE EXTENT THE CISO IS

1 ADVISING THE COURT ABOUT WHAT IT'S LEGALLY REQUIRED TO
2 DO IN TERMS OF PUTTING THINGS ON THE RECORD, WE OBJECT.

3 THE COURT: I UNDERSTAND.

4 I DON'T BELIEVE THAT THE CISO PERSONNEL
5 ARE LAWYERS. MAYBE SOME ARE.

6 ANYWAY. ALL RIGHT. THANK YOU.

7 YOUR OBJECTION IS MAINTAIN -- IS NOTED
8 AND MAINTAINED. THANK YOU.

9 **(END OF PROCEEDINGS)**

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